Supreme Court, U.S.
FILED
JAN 17 2006
OFFICE OF THE CLERK

No. 05-897

IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY

Petitioner,

v.

STEPHEN J. HATFILL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has instructed that the First Amendment limits defamation claims to the reasonable meanings of words in context, but has never defined how this standard applies when unstated defamatory implications are allegedly conveyed. Here, a divided panel of the court of appeals reinstated claims for libel and intentional infliction of emotional distress based on the allegation that opinion columns criticizing the FBI's unsuccessful investigation of the deadly anthrax mailings in 2001 *implicitly* accuse plaintiff of responsibility for those mailings, even though the columns explicitly and unambiguously disavow any such accusation.

1. Does the First Amendment limit the actionable defamatory implications arising from a publication about a matter of public concern to those that a recipient would reasonably conclude the publication, taken as a whole, was intended to convey?

2. Does the First Amendment preclude liability for the tort of intentional infliction of emotional distress based upon the alleged publication of a false and defamatory implication, when the challenged publication involves a matter of public concern and was not written for the specific purpose of inflicting harm on the plaintiff?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) and Rule 29.6 of the Rules of the Supreme Court of the United States, the following are parties to the proceeding below:

The New York Times Company, appellee below and petitioner here, is a publicly traded company and has no affiliates or subsidiaries that are publicly owned and no publicly held company owns more than 10% of its stock.

Steven J. Hatfill, appellant below and respondent here, is an individual.

Nicholas Kristof, an individual, was dismissed as a defendant in the case by the district court pursuant to a stipulated order, and he is not a party to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The New York Times Company (the "Times") respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 416 F.3d 320, and is reprinted in the Appendix. App. 1a-32a. The decision of the United States Court of Appeals for the Fourth Circuit, denying rehearing or rehearing *en banc*, together with the opinion of Judge Wilkinson (joined by Judges Michael and King) dissenting from the denial of rehearing *en banc*, is reported at 427 F.3d 253, and is reprinted in the Appendix. App. 62a-74a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 2004 WL 3023003, and is reprinted in the Appendix. App. 35a-61a.

JURISDICTION

The decision of a panel of the Court of Appeals for the Fourth Circuit was rendered on July 28, 2005. The Court of Appeals denied a petition for rehearing or rehearing *en banc* on October 18, 2005. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution, which provides in pertinent part: "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ." U.S. Const., amend. I.

STATEMENT OF THE CASE

A. Background

In late 2001, the nation was terrorized when anthrax-laced envelopes were sent by mail to a number of public officials and prominent members of the news media. The mailings caused at least five deaths. App. 3a. The FBI thereafter launched what was publicly described as one of the largest and most important domestic terrorism investigations ever carried out by the federal government.[1] Almost a year later, in August 2002, Attorney General John Ashcroft publicly identified Dr. Steven Hatfill ("Hatfill") as a "person of interest" to the FBI's investigation. *Hatfill v. Ashcroft*, No. 03-1793 (D.D.C.), First Amended Complaint at ¶ 51 (filed Nov. 18, 2005).

Hatfill had been called to the attention of FBI investigators months earlier by scientists who identified him as one of a handful of microbiologists working in the United States who had the "ability, access and motive" to have carried out the mailings. The FBI took a number of steps to investigate Hatfill, which included subjecting him to a polygraph exam and conducting a very public search of his home in Maryland. *Id.* ¶ 32. These actions were widely reported in the press before the Attorney General identified Hatfill as a specific "person of interest." *Id.* ¶ 51. Hatfill has never been charged with the crime, nor has anyone else.

Between May and August 2002, Nicholas Kristof wrote a number of Op-Ed columns in *The New York Times* addressing the status of the anthrax investigation. He maintained that the success of this investigation was vital to national security, criticized the FBI's "inept" and "lackadaisical" handling of the investigation, and questioned

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[1] *See, e.g.*, Tania Valdemoro, *Lawsuits Could Shed Light on Anthrax Probe*, Palm Beach Post, May 14, 2005, at C1.

the adequacy of security at government bio-defense research facilities. App. 90a-106a. The columns made plain the author's view that FBI missteps were making the nation significantly more vulnerable to a potential bio-terrorism attack.

Kristof used what he believed to be the inadequate effort to investigate Hatfill as one example of what he perceived as the FBI's many failings. Because Kristof's point was not to assign guilt or innocence to Hatfill, but rather to call attention to what he believed was grossly deficient performance by the government, the initial columns did not name him. They referred instead to an unnamed "Mr. Z," a scientist being investigated in a slip-shod manner that typified the entire anthrax investigation as far as Kristof was concerned. One column, for example, posed a series of questions about Mr. Z that the FBI could not answer and had failed to investigate for nearly six months. App. 95a-96a. Kristof explained that his purpose was to "light a fire under the FBI" in order to "reduce our vulnerability to another attack." App. 92a.

While invoking the investigation of Hatfill to dramatize a larger issue, the columns also took care to caution readers *against* drawing any conclusion of Hatfill's guilt. Among other things, the columns noted that:

- Hatfill "denies any wrongdoing," and "denies any involvement," App. 95a, 98a;
- His "friends are heartsick at suspicions directed against a man they regard as a patriot," App. 95a;
- The FBI should either "go after him more aggressively" or "exculpate him," *id.*;
- "It must be a genuine assumption that [Hatfill] is an innocent man caught in a nightmare," App. 104a; and

- "There is not a shred of traditional physical evidence linking him to the attacks." *id.*

The columns made plain that the author did not know whether Hatfill was responsible – and stressed that this scientist should be presumed innocent – but lashed out at the FBI for conducting such an ineffective investigation that it could neither "indict" nor "exonerate" him more than eight months into the investigation. App. 106a.

B. Proceedings Below

In July 2004, Hatfill filed a diversity action against the Times in the United States District Court for the Eastern District of Virginia, asserting claims for libel and intentional infliction of emotional distress based on the publication of Kristof's columns.[2] His Complaint advanced three causes of action. The first asserts a claim for libel by implication, alleging that the Op-Ed columns imply that Hatfill is the anthrax mailer. App. 87a-88a ¶ 42. The second cause of action alleges that a number of facts in the columns are themselves false, further the implication of guilt, and are therefore independently defamatory. App. 88a ¶ 43; *see also* App. 80a-81a ¶ 16. Among the allegedly false facts are that Hatfill had: (1) the "the ability, access, and motive to make and send the anthrax," (2) access to an "'isolated residence' where he gave visitors an anthrax antidote," (3) "up-to-date anthrax vaccinations," and (4) failed three FBI polygraph examinations. App. 26a. The final cause of action seeks recovery for the tort of intentional infliction of emotional distress based on the publication of Kristof's columns. App. 88a ¶ 44.

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[2] Hatfill had tolled the one-year Virginia statute of limitations on his tort claims by filing, and then withdrawing, a suit seeking similar relief in state court. App. 12a-13a, 41a. That earlier lawsuit was never served on the Times, which had no notice of its existence. App. 13a, 41a.

1. District Court's Dismissal.

The Times moved at the outset to dismiss Hatfill's claims under Fed. R. Civ. P. 12(b)(6) as insufficient at common law and barred by the First Amendment. *See Hatfill v. New York Times Co.*, No. 1:04-cv-807 (E.D. Va.), Memorandum in Support of Defendant's Motion to Dismiss the Complaint, at 12 (filed Sep. 10, 2004) (principle that allegation of wrongdoing does not carry implication of guilt "has long been recognized at common law, and it is mandated by the First Amendment"). Relying only on the text of the columns as published, the district court (Hilton, C.J.) granted the motion on multiple, independent grounds. App. 43a-57a.

The district court dismissed the claim for libel by implication for two reasons. First, when taken as a whole and read in context, the columns could not reasonably be read "as accusing Hatfill of actually being the anthrax mailer." App. 46a. The district court recognized that the "threshold question" in any claim of libel is whether the publication "reasonably convey[s]" the defamatory meaning alleged, App. 45a, and concluded that an accusation of guilt could not reasonably be drawn from Kristof's columns: "Critiquing the propriety of the FBI's investigation and raising questions of legitimate concern to the public is not the same as a direct accusation of wrongdoing," especially where the columns "specifically caution that there may be no connection, that his friends consider him a patriot, and that a thorough FBI investigation may well exculpate him of any wrongdoing." App. 48a, 46a. The district court determined that this conclusion was "mandated" by the First Amendment as well, which precludes a cause of action for libel by implication based on accurate reports about a government investigation. App. 45a.

Second, the district court held that to state a claim for libel by implication, the publication must "'affirmatively

suggest that the author intends or endorses'" the alleged implication. App. 49a (citations omitted). "Because the columns specifically and repeatedly disavow any conclusion of guilt," the district court could find no such intent on the face of the publications. App. 49a-50a.

Having concluded that the columns could not reasonably be read to convey an implication of guilt, the district court also dismissed the separate libel claim based on specific allegedly false facts in the columns. The court held that none of these "discrete untruths" was independently defamatory, even if false. App. 52a. Making claims such as that Hatfill had the "ability, access and motive" to send anthrax, or up to date anthrax vaccinations, the district court concluded, did not independently harm his reputation.[3]

Finally, the district court dismissed Hatfill's claim for infliction of emotional distress for three primary reasons: First, publishing commentary on a matter of public concern cannot, alone, be deemed so "outrageous and intolerable" to support such a cause of action, even when the publication allegedly contains false facts. App. 55a. Second, a separate claim for intentional infliction based upon the publication of allegedly false and defamatory words is "impermissibly duplicative" and "evade[s] the constitutional limits" placed on damage claims "arising solely out of an act of publication." App. 56a-57a. Third, the complaint failed to allege facts showing the type of "severe" emotional damage required under Virginia law. App. 56a.

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[3] The district court also found the defamation claim based on specific false facts to be time-barred, since the allegedly false facts had not been pleaded in the earlier state court action. App. 51a. This decision was also reversed by the Court of Appeals. App. 25a-26a.

2. Panel Decision of the Fourth Circuit

Hatfill appealed and the United States Court of Appeals for the Fourth Circuit reversed, by a divided panel. The panel majority (Wilkins, C.J. and Shedd, J.) agreed that "defamatory meaning is a question of law to be decided by the court," App. 16a, but did not endorse the district court's search for the "reasonable" meaning conveyed by the columns construed as a whole. Instead, the majority identified the court's role under Rule 12(b)(6) as limited to determining whether the columns were "capable of defamatory meaning under Virginia law, i.e. whether they imputed to Hatfill the commission of a crime of moral turpitude." App. 23a.

To answer this question, the court of appeals looked to specific statements made in the columns to decide whether they could "naturally and presumably be understood" as charging a crime. App. 18a (citation omitted). It then concluded that Kristof's specific references to Hatfill could indeed lead a reader to believe he had the "motive, means and opportunity" to prepare and send the anthrax letters, that he was a suspect of the "biodefense community as well as federal investigators," that he had failed three polygraph exams and other facts that incriminated him in the mailings. App. 21a. The panel majority concluded that these facts were sufficient to convey an implication of guilt because they were more incriminating than facts held to support an inference of wrongdoing in three other cases decided under Virginia law. App. 18a-21a.

By focusing its analysis on the reasonable implications that could be drawn from specific passages, the majority avoided any need to discern what a reasonable reader would draw from the columns as a whole. Instead, the majority dismissed Kristof's express disclaimers of any accusation of guilt and cautions to readers not to prejudge Hatfill as legally

irrelevant. App. 22a-23a (defendant cannot "escape liability" by pairing a charge of wrongdoing with "statement that the subject must, of course be presumed innocent"). By taking this approach, the panel majority avoided any need to weigh the reasonable impact on readers of the columns' express assertions that Hatfill "denies any wrongdoing," the disclosure that "[t]here is not a shred of physical evidence linking him to the attacks," or the caution that "[i]t must be a genuine assumption that [Hatfill] is an innocent man caught in a nightmare." In addition, the panel cites no authority for its decision to dismiss these statements as irrelevant and none of the libel by implication cases on which it relies involved similar disclaimers. The panel's decision acknowledges no judicial obligation to consider the columns as a whole in determining the reasonableness of the implied meaning allegedly conveyed.

The majority also rejected the district court's conclusion that a libel by implication claim cannot lie unless the challenged publication reasonably conveys the author's intent to endorse the alleged implication. In so holding, the panel majority distinguished prior Fourth Circuit precedent requiring just this, on the ground that the implication of guilt in this case flowed from facts that were themselves alleged to be false. App. 23a, n.7.

Having concluded that statements contained in the columns were "capable" of implying Hatfill's guilt, the panel majority also reinstated in large part his separate defamation claim alleging that they contained "discrete untruths." The majority held that most of these alleged falsehoods "are capable of incriminating Hatfill in the anthrax mailings." App. 26a.[4]

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[4] The panel affirmed the district court only in its dismissal of the libel claim directed at an allegedly false statement that described certain activities of Hatfill with his girlfriend, which it held "does not incriminate

Finally, the majority reinstated Hatfill's claim for infliction of emotional distress because the allegation that the Times had "intentionally published false charges accusing [plaintiff] of being responsible for the anthrax mailings . . . without giving [him] an opportunity to respond," asserted sufficiently "outrageous" conduct to state a claim. App. 28a. Although the panel majority thought it "unlikely" plaintiff could prevail on this cause of action if he could not satisfy the constitutional requirements applicable to his claims for libel, it did not find any First Amendment-based obstacle to the independent cause of action he alleged. App. 28a-29a.

Judge Niemeyer dissented. Like the district court, he concluded that, on a motion to dismiss, the court must assess the reasonableness of the defamatory implication alleged by the plaintiff by reference to the publication as a whole. Undertaking that analysis, Judge Niemeyer found "nothing in the letter or spirit of the columns" taken as a whole that could reasonably be construed to accuse Hatfill of the murders. App. 30a. Judge Niemeyer stressed that "inaccurately reporting the suspicious circumstances surrounding a suspect does not amount to inaccurately accusing—either expressly or impliedly—the suspect of actually committing the crime." App. 31a.

3. Denial of Rehearing En Banc

The Times petitioned the court of appeals for rehearing *en banc*. App. 62a. The petition was denied by an evenly divided court, on a vote of six to six. App. 63a.

Judge Wilkinson, joined by Judges Michael and King, filed a dissenting opinion, protesting that the decision to allow this case to proceed "will restrict speech on a matter of

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Hatfill in the anthrax mailings and so is not actionable under this Complaint." App. 26a.

vital public concern." App. 64a.[5] In their view, the panel majority had read Virginia law "aggressively" and "expansively" in a manner that "not only portends liability for valuable public commentary but aggravates, rather than alleviates, the constitutional tensions inherent in the defamation field." *Id.*

The dissenting judges found the conclusions of the panel majority concerning plaintiff's libel claims "both factually and legally incorrect." App. 68a. As a factual matter, they concluded that the columns as a whole cannot reasonably be read to accuse Hatfill of guilt; as a matter of law, they determined that the panel majority had "extend[ed] liability for defamation per se" beyond any precedent cited. App. 69a-70a. According to Judge Wilkinson, the majority had identified no Virginia case allowing a libel by implication claim to proceed over the author's express and unambiguous disavowal of the alleged implication and, "[a]t a minimum, these precedents do not provide the type of unambiguous support necessary to impose liability under constitutionally tense circumstances." App. 71a.

The dissenters found the panel's holding with respect to Hatfill's emotional distress claim to be similarly incorrect on "both fact and law." App. 72a. Factually, they concluded, this holding as well was premised on a non-existent implication of guilt and, legally, they asserted that, under the

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[5] This case arrives at the Court in a similar posture to *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) – another case involving the limitations imposed by the First Amendment on the common law of torts in which the Fourth Circuit denied rehearing *en banc* by an evenly divided court over the vigorous dissent of Judge Wilkinson. *See Falwell v. Flynt*, 805 F.2d 484 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of rehearing *en banc*). The Court in that case granted the writ "[g]iven the importance of the constitutional issues involved," and unanimously affirmed Judge Wilkinson's construction of the First Amendment. 485 U.S. at 50.

First Amendment, publishing information – even false information – about a matter of public concern cannot be considered "'beyond all bounds of decency.'" *Id.*

In Judge Wilkinson's view, the procedural posture of the case can not obscure the seriousness of the constitutional error inherent in the panel's decision, App. 73a-74a:

> If one purpose of public commentary is to assess the functioning of government, these columns were surely in that vein. In fact, the anthrax mailings and the government's response to them lie at the heart of legitimate public inquiry. . . . I believe the defendant was simply doing its job. It is a job that the Constitution protects.

REASONS FOR GRANTING THE WRIT

1. The First Amendment limits the range of defamatory meanings that may be punished through libel litigation to the "reasonable" meanings of words in the context they are used. *Greenbelt Coop. Publ'g Co. v. Bresler*, 398 U.S. 6 (1970). This Court, however, has never articulated the constitutionally required standard for policing the line between protected and unprotected speech when a libel by implication is alleged on the basis of an unstated meaning. This issue is vitally important because the existing First Amendment protections for speech about matters of public concern all turn on the actionable meaning conveyed by a challenged publication. The constitutional obligation of a plaintiff to prove both falsity and fault provides no meaningful protection for the freedom of expression if liability can be imposed, as the Fourth Circuit held it can be here, on the basis of an implied meaning that is not reasonably conveyed by a publication construed as a whole. The common law has typically required that allegedly defamatory publications be considered in their entirety and in

context to determine if an actionable implication is reasonably conveyed, but the Fourth Circuit rejected this approach. Instead, it held that a libel claim can properly be based on an implication that specific statements, considered in isolation, are "reasonably capable" of conveying, without assessing their reasonable meaning in light of the publication as a whole. This approach conflicts with this Court's precedents construing the First Amendment as well as those of several courts of appeals and state court of last resort. The holding below imposes substantial burdens on the freedom of speech and of the press and, if permitted to stand, will inhibit criticism of the government and penalize speech about public matters in violation of the First Amendment.

2. The lower courts continue to struggle with the extent to which the First Amendment limits tort claims for the intentional infliction of emotional distress premised on the allegation that news reports or commentary about matters of public concern are not only false, but "outrageous." Given the inherent constitutional tensions when liability is imposed on such speech, several appellate courts have concluded that the First Amendment precludes the imposition of tort liability under the malleable standard of the intentional infliction tort, and have limited plaintiffs to their remedies under the law of libel. Other courts consider claims for the intentional infliction of emotional distress permissible only when the plaintiff can plead and prove the additional element that a false report was published for the specific purpose of causing harm to the plaintiff. Still other courts have held that reporting about matters of public concern cannot be considered sufficiently "outrageous" to satisfy the tort's requirements. In this case, the Fourth Circuit rejected any such limitations and allowed litigation to proceed to determine whether Op-Ed columns addressing an issue of undisputed public concern are "outrageous." This Court should grant the Petition for the additional reason that its

guidance is necessary to resolve the ongoing uncertainty among the lower courts concerning the extent to which the First Amendment limits the reach of the tort of intentional infliction of emotional distress in such circumstances.

I. THE HOLDING BELOW UNDERMINES THE EXISTING CONSTITUTIONAL PROTECTION AFFORDED SPEECH ABOUT MATTERS OF PUBLIC CONCERN AND CONFLICTS WITH THE DECISIONS OF THIS AND OTHER COURTS

The holding below requires a newspaper to defend the truth of an accusation of criminal guilt allegedly conveyed *implicitly* by opinion columns that disavow the accusation *expressly*, unambiguously cautioning readers not to jump to any such conclusion. This anomalous holding is the direct result of the Fourth Circuit's application of a constitutionally impermissible standard to assess the efficacy of the defamatory meaning alleged by a libel plaintiff. That standard imposes significant new burdens on speech about matters of public concern, conflicts with prior holdings of this Court and other appellate courts, and undermines existing First Amendment protections in a number of significant ways.

In every libel action at common law, the trial court must decide in the first instance whether the challenged statement is "capable of a defamatory meaning" as a matter of law. If a statement can reasonably be construed in a defamatory sense, the jury must then decide if it was actually understood in that manner. *See, e.g.*, *Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998); *Albert Miller & Co. v. Corte*, 107 F.2d 432, 434 (5th Cir. 1939); *accord Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005); *Remick v. Manfredy*, 238 F.3d 248, 261 (3d Cir. 2001); *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996). Since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the trial court's threshold determination

of meaning has also necessarily been a constitutional inquiry. In *Sullivan* itself, the Court struck down an Alabama court's judgment that an advertisement criticizing unnamed officials had implicitly referred to a city commissioner. Considering the allegedly defamatory statements in context, the Court held that the advertisement "could not *reasonably* be read as accusing respondent of personal involvement in the acts in question" and that the Alabama courts' contrary conclusion, if not reversed, would have "disquieting implications for criticism of government conduct." *Id.* at 288-89, 291.

Subsequently, in *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), the Court squarely held that the First Amendment precluded the conclusion that the use of the term "blackmail" was reasonably capable of a defamatory meaning in a newspaper article that accurately reported its use during a heated public meeting. Specifically, the Court held that the First Amendment protected the speech at issue because "[n]o reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense." *Id.* at 14. The conclusion that the newspaper had accused the plaintiff of a crime was "constitutionally impermissible" because *"as a matter of constitutional law*, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported." *Id.* at 13 (emphasis added).

To reach this conclusion, the Court considered the challenged statement in full and assessed the meaning reasonably conveyed by the words used in the context in which they were published. *Id.* at 13-14. Justice White, concurring, underscored that the constitutional holding in *Bresler* makes it the court's responsibility to determine in the first instance what "ordinary readers" would reasonably understand the publication at issue to mean. *Id.* at 22. *See*

also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-85 (1974) (holding that libel judgment could not be based on use of term "scab" in labor dispute because, in context, it did not reasonably imply that plaintiffs were "traitors" or guilty of treason).

The constitutional importance of the limitation on actionable meanings to those "reasonably" conveyed was further underscored in the Court's decision rejecting an independent First Amendment-based privilege protecting opinion. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court concluded that no such privilege is necessary specifically because the First Amendment already precludes the imposition of liability "for statements that cannot '*reasonably* [be] interpreted as stating actual facts' about an individual." *Id.* at 20 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. at 50 (emphasis added)). Rather, a statement of opinion about a matter of public concern can only give rise to liability if it "*reasonably* implies false and defamatory facts." *Id.*

Thus, when assessing the reasonableness of the defamatory meaning alleged by the plaintiff, courts have typically considered it their obligation – both at common law and under the First Amendment – to construe the words used in the context of the entire publication read as a whole. *E.g.*, *Knievel*, 393 F.3d at 1074 (defamatory meaning must be determined "in context" without reading statements "in isolation"); *Amrak Prod., Inc. v. Morton*, 410 F.3d 69, 72-73 (1st Cir. 2005); *Hoffman-Pugh v. Ramsey*, 312 F.3d 122, 1225 (11th Cir. 2002); *Rose v. Indianapolis Newspapers, Inc.*, 213 F.2d 227, 229 (7th Cir. 1954); *Forsher v. Bugliosi*, 608 P.2d 716 (Cal. 1980); *Klayman v. Segal*, 783 A.2d 607, 614 (D.C. 2001); *Foley v. Lowell Sun Publ'g Co.*, 553 N.E.2d 196, 197 (Mass. 1989); *James v. Gannett Co.*, 353 N.E.2d 834, 838 (N.Y. 1976); *Yeagle*, 497 S.E.2d at 138-39.

In cases alleging a libel by implication, moreover, some courts have required that the statements published reasonably indicate, on their face, an intent by the author to convey the unstated implication. *E.g.*, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993); *White v. Fraternal Order of Police*, 909 F.2d 512, 526 (D.C. Cir. 1990); *see* Restatement (Second) of Torts § 563 (1977) (actionable meaning of a publication is that which recipient "reasonably understands that it was intended to express").

In this case, however, the Fourth Circuit limited the legal inquiry to a determination of whether specific statements in the columns could "naturally and presumably be understood" as charging a crime. App. 18a. The court did not assess whether it was reasonable for a reader to derive such a meaning from each of the columns considered in their entirety, but instead found that it is sufficient if specific statements in the columns, standing alone, could reasonably be construed to suggest that Hatfill had committed a crime. App. 21a (identifying specific references that are "capable" of implicitly accusing Hatfill of responsibility for the anthrax mailings). The Fourth Circuit never acknowledged the requirement that a court consider the publication at issue "as a whole" in assessing whether a defamatory meaning is reasonably implied by it. To the contrary, the court of appeals rejected any judicial obligation to weigh the impact of the express and unambiguous disclaimers contained in the columns:

> Just as a defendant cannot escape liability for making a false assertion of fact by prefacing that assertion with the words "in my opinion," neither can it escape liability simply by pairing a charge of wrongdoing with a statement that the subject must, of course, be presumed innocent.

App. 22a-23a (citations and footnote omitted). This standard of assessing defamatory meaning significantly lowers the bar for a plaintiff alleging libel by implication and cannot be reconciled with this Court's decisions in *Sullivan*, *Bresler*, and *Milkovich*.[6]

For that reason, "[t]he consequences of this decision for the First Amendment run deep." App. 73a (Wilkinson, C.J., dissenting). Simply put, the Fourth Circuit's holding eliminates the speech-protective function historically served by the judicial determination of defamatory meaning and threatens valuable speech about matters of public concern. As Judge Wilkinson recognized:

> Even if liability is defeated down the road, the damage has been done. The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well. To allow litigation to impose large costs will dull democracy at the local level, because the monetary impacts of litigation will prove unacceptably high.

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[6] The Fourth Circuit also rejected any obligation to determine that the publications reasonably indicate an intent by the author to convey the defamatory implication alleged. App. 23a, n.7. The panel majority dismissed this requirement as entirely "immaterial," because the implication flows in part from facts that are themselves alleged to be false. App. 23a, n7. As Judges Niemeyer and Wilkinson both noted in their respective dissents, however, "[r]eporting suspicion of criminal conduct – even elaborately and sometimes inaccurately – does not amount to an accusation of criminal conduct as necessary to support Dr. Hatfill's claim" and is therefore irrelevant to the court's assessment of the reasonableness of the defamatory meaning proffered by the plaintiff. App. 32a; see also App. 69a.

App. 67a.

In addition, the standard adopted by the Fourth Circuit undermines the entire regime of existing First Amendment protections afforded speech about matters of public concern in the context of the law of defamation. Under this Court's previous holdings, for example:

- The Constitution requires a plaintiff to prove that a defamatory publication about a matter of public concern was made with some level of fault by the defendant. *Sullivan*, 376 U.S. at 279-83; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).
- The Constitution compels a libel plaintiff to "bear the burden of proving falsity, as well as fault, before recovering damages" in such circumstances. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 792 (1986).
- The Constitution prohibits presumed or punitive damages unless "actual malice" is established by the plaintiff. *Gertz*, 418 U.S. at 350.

This framework of protection depends fundamentally on a proper threshold determination of the false and defamatory meaning at issue. As the Court recognized in *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967), even a negligence standard of care is "elusive" when the content of the speech itself affords no warning of prospective harm to another through falsity.

At bottom, the First Amendment cannot permit a plaintiff to litigate through a libel case the truth or falsity of an implication an author expressly disavows, and one that no reasonable reader of the publication as a whole would understand to have been conveyed. The expansive theory of libel by implication accepted by the Fourth Circuit would

"permit liability for the perceived tone of a publication, for statements that are in substance opinion or true, or for statements about public persons that do not pass the 'actual malice' test." Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* § 2.4.5 (3d ed. 2004) ("Sack").[7] In the absence of "a clear standard to resolve questionably defamatory cases – particularly those involving implication – the lower courts create a risk of destroying the utility of the Supreme Court's standards of care for potentially defamatory material." Diane L. Zimmerman, *Curbing the High Price of Loose Talk*, 18 U.C. Davis L. Rev. 359, 394 (1985).

This constitutional issue is particularly compelling in this case, which involves criticism of the government "on a matter of vital public concern." App. 64a. As the Court explained in *Sullivan*, the "possibility that a good-faith critic of government will be penalized for his criticism . . . strikes at the very center of the constitutionally protected area of expression." 376 U.S. at 292.[8] And, as Judge Wilkinson

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[7] Many courts have recognized that a publisher cannot act with appropriate regard to the truth or falsity of a statement it never intended to convey. *E.g.*, *Andrews v. Stallings*, 892 P.2d 611 (N.M. Ct. App. 1995); *Schwartz v. Am. Med. Ass'n*, 23 F. Supp. 2d 1271 (D.N.M. 1998); *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408, 1413 (C.D. Cal. 1987); *see also* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning and State of Mind: The Promise of New York Times v. Sullivan*, 78 Iowa L. Rev. 237 (1993). *But see Weller v. ABC*, 283 Cal. Rptr. 644, 650 n.8 (Cal. Ct. App. 1991) (existence of defamatory implication "is not an issue of constitutional law"); *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.*, Nos. 2002-SC-0693-DG, 2002-SC-0697-DG, 2003-SC-0634-DG, 2005 WL 2043633 (Ky. Aug. 25, 2005) (same).

[8] Although this case arises from the denial of a motion to dismiss, the important legal issues it presents are fully developed and ripe for review. The issue of the actionable meanings conveyed by speech is typically raised through a motion to dismiss and resolved as a matter of law solely

underscored below, the decision "in *this* case," if not reversed by this Court, "will restrict speech on a matter of vital public concern." App. 64a, 65a-66a (emphasis added).

II. THE HOLDING BELOW EXPANDS LIABILITY FOR INFLICTION OF EMOTIONAL DISTRESS IN A MANNER THAT FURTHER THREATENS PROTECTED SPEECH

The Fourth Circuit's holding that Hatfill may proceed with a claim for intentional infliction of emotional distress threatens to undermine significantly the First Amendment's protection of speech on matters of public concern in a distinctly different manner – by allowing "a news report on a subject of unquestioned public interest" to be challenged as "outrageous." App. 72a. The application of the vague standard applied under this still-evolving tort to publications about matters of public concern raises significant constitutional issues that have yet to be resolved by this Court.

Eighteen years ago, this Court held that the "First Amendment [places] limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress." *Hustler Magazine v. Falwell*, 485 U.S. at 50. In

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on the basis of the words used in the challenged publication. *E.g.*, *Knievel*, 393 F.3d 1068; *Hoffman-Pugh*, 312 F.3d 122; *Dilworth*, 75 F.3d 307. Accordingly, no additional facts need to be developed beyond the statements at issue and none were relied upon below in reaching the legal conclusion that the defamatory meaning alleged was reasonably conveyed. As Judge Wilkinson observed below, "[t]he most critical part of the record – the speech itself – is available prior to any discovery." App. 65a-66a. Put differently (App. 66a.),

> [i]t makes little sense to acknowledge the special sensitivity of speech to defamation actions and then to say that speech interests matter little or not at all because of the procedural posture of the action.

that case, the Reverend Jerry Falwell sued Hustler Magazine over its publication of an ad parody suggesting that Falwell had engaged in "a drunken incestuous rendezvous with his mother in an outhouse." *Id.* at 47. The jury rejected Falwell's libel claim, concluding that no false fact was actually conveyed because, among other reasons, the ad contained a disclaimer that it was a "parody." The jury awarded damages, however, on Falwell's claim for intentional infliction of emotional distress, finding that the ad parody was both "outrageous" and motivated by spite. *Id.* This Court overturned that verdict on the ground that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications" without showing that a false fact was published with "actual malice." *Id.* at 56.

In the years since *Falwell*, plaintiffs have routinely added "tag-along" claims for intentional infliction of emotional distress to their causes of action for libel. *See, e.g.*, *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 510 (1st Cir. 2002); *Cook v. Winfrey*, 141 F.3d 322 (7th Cir. 1998); *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018 (2d Cir. 1997). The decision in *Falwell* has offered little guidance to courts adjudicating such claims that false speech is actionable under this tort because it is alleged to be "extreme and outrageous." *See* Robert C. Post, *The Constitutional Concept of Public Disclosure: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 603, 614-15, n. 66 (1990).

The pleading of the tort of intentional infliction of emotional distress alongside a cause of action for defamation presents significant constitutional issues precisely because of the vague standards by which emotional distress claims are judged. In this case, for example, the Fourth Circuit permitted such a cause of action to go forward for a jury

determination of whether publication of the columns at issue "was sufficiently outrageous to warrant recovery." App. 29a. *See, e.g.*, *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991) (liability exists if conduct is "outrageous in character" and "extreme in degree"); *Howell v. New York Post Co.*, 612 N.E.2d 699 (N.Y. 1993); *Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993); Restatement (Second) of Torts § 46, comment d (1977).

In *Falwell*, this Court recognized that this standard of "outrageousness" has an "inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views" and warned that, when applied to a publication, it "runs afoul of our long-standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." 485 U.S. at 55. The Court, however, has yet to address squarely the extent to which the First Amendment precludes emotional distress claims when they are aimed at speech on matters of public concern.

As a result, the lower courts have constructed various inconsistent approaches to assess the viability of claims alleging the intentional infliction of emotional distress arising from "outrageous" publications. These approaches, however, often fail to address adequately the constitutional issues raised by such claims and the absence of uniformity provides no clear guidance to would be speakers concerning when their speech may be actionable in tort on this basis. Thus, for example, some courts have avoided confronting the constitutional efficacy of the tort as applied in the context of speech about public matters by holding that it cannot simply duplicate a claim for libel. *See, e.g.*, *Moss*, 312 F.3d at 510 ("[e]motional distress resulting from harm to reputation and good name caused by the publication of defamatory statements cannot give rise to a separate action for intentional

infliction of emotional distress"); *Chaiken v. VV Publ'g Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995), *aff'd*, 119 F.3d 1018 (2d Cir. 1997). Other courts require plaintiffs alleging the intentional infliction of emotional distress to plead and prove the added element that defendant published allegedly false facts specifically to cause harm to the plaintiff. *E.g.*, *Lambert v. Garlo*, 484 N.E.2d 260 (Ohio 1985); *Levin v. McPhee*, 917 F. Supp. 230, 242-43 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 189 (2d Cir. 1997). Still other courts, however, consider either of these limitations on the reach of the tort to be wholly inappropriate. *E.g.*, *Bell v. Nat'l Republican Cong. Comm.*, 187 F. Supp. 2d 605 (S.D.W. Va. 2002); *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099 (D.D.C. 1991); *Lewis v. First Nat'l Bank of Stuart*, 645 F. Supp. 1499 (W.D. Va. 1986), *aff'd*, 818 F.2d 861 (4th Cir. 1987).

Drawing on different legal principles, another body of cases flatly declares that speech about matters of public concern can never be sufficiently "outrageous," as a matter of law, to satisfy the tort's requirements, even if a publication contains false facts or implies criminal wrongdoing. *See, e.g.*, *Tackett v. KRIV-TV (Channel 26)*, Civ. A. No. H-93-3699, 1994 WL 591637, at *2 (S.D. Tex. May 5, 1994); *Levin*, 917 F. Supp. at 243; *see generally Ruffin-Steinback v. dePasse*, 267 F.3d 457, 465 (6th Cir. 2001) (publication of "inaccurate" facts not "beyond all bounds of decency"); *Cook*, 141 F.3d at 321 (noting that "Illinois courts dismiss intentional infliction claims based upon defamation because the conduct is not 'extreme and outrageous'") (citations omitted). Not all courts, however, have embraced this approach. *See Bell*, 187 F. Supp. 2d 605 (allowing emotional distress claim where implication that plaintiff is a child molester could be considered "extreme and outrageous").

The Fourth Circuit has now added to this palpable confusion by rejecting all of these approaches. In this case, the court of appeals held here that: (a) an allegation that the Times published "false charges accusing [Hatfill] of being responsible for the anthrax mailings that resulted in five deaths, without regard for the truth of those charges" was sufficient, if proven, to amount to "extreme and outrageous" conduct, (b) such a claim was not impermissibly duplicative of a cause of action for defamation, and (c) Hatfill is not barred from pursuing such a claim by his concessions that the publications at issue all had a clear purpose other than to cause him harm. App. 28a-29a. Indeed, the Fourth Circuit has gone so far as to disregard the central tenet of *Falwell*, finding no First Amendment bar to liability for the intentional infliction of emotional distress even in the event that plaintiff "ultimately cannot prevail on his defamation claims because he is unable to satisfy the constitutional requirements for recovery." App. 28a-29a.

In dissenting from the denial of rehearing, Judge Wilkinson articulated the inevitable consequences of the panel's decision for free expression, App. 72a:

> [The columns] report on a matter of unquestioned public interest with urgent national security implications. The First Amendment expressly specifies that the "civilized community" in which we live is one that encourages public commentary of this type. Even assuming the columns contain the asserted factual errors, their publication is neither "intolerable" nor "atrocious."

If permitted to stand, the decision below will invite additional "intentional infliction" litigation, and require news organizations to defend claims that previously would not have been filed or would have been dismissed at the outset. This Court should grant the Petition to articulate the limits

that the First Amendment places on claims for the intentional infliction of emotional distress.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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January 17, 2006

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOUTH CIRCUIT

STEVEN J. HATFILL,
Plaintiff-Appellant,

v.

THE NEW YORK TIMES COMPANY
Defendant-Appellee,

No. 04-2561

and

NICHOLAS KRISTOF,
Defendant.

Appeal from the United States District Court for the
Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.
(CA-04-807-A)

ARGUED: MAY 24, 2005

DECIDED: JULY 28, 2005

Before WILKINS, Chief Judge, and NIEMEYER and
SHEDD, Circuit Judges.

Reversed and remanded by published opinion. Judge Shedd wrote the majority opinion, in which Chief Judge Wilkins joined. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: Christopher J. Wright, HARRIS, WILTSHIRE & GRANNIS, L.L.P., Washington, D.C., for Appellant. David A. Schulz, LEVINE, SULLIVAN, KOCH & SCHULZ, L.L.P., New York, New York, for Appellee. **ON BRIEF:** Thomas G. Connolly, Mark A. Granis, HARRIS, WILTSHIRE & GRANNIS, L.L.P., Washington, D.C., for Appellant. Jay Ward Brown, LEVINE, SULLIVAN, KOCH & SCHULZ, L.L.P., New York, New York; David E. McCraw, THE NEW YORK TIMES COMPANY, New York, New York, for Appellee.

OPINION

SHEDD, Circuit Judge:

Dr. Steven J. Hatfill sued The New York Times Company ("The Times") and columnist Nicholas Kristof, alleging claims under Virginia law for defamation and intentional infliction of emotional distress. Hatfill's claims arise from The Times' publication of a series of Kristof's columns concerning the federal investigation into the mailing of letters laced with anthrax in the fall of 2001. The district court dismissed Hatfill's complaint under Fed. R. Civ. P. 12(b)(6), and Hatfill now appeals. We conclude that Hatfill has adequately pled the elements of his claims under Virginia law, and we reverse the ruling of the district court.

I.

In the fall of 2001, shortly after the terrorist attacks on the World Trade Center and the Pentagon, someone mailed

letters laced with anthrax to several news organizations and members of Congress.[1] At least five people died as a result of contact with these letters, and the federal government launched an investigation to identify and capture the responsible party or parties. By May 2002, the Federal Bureau of Investigation ("FBI") had not made any arrests.

Kristof writes a regular column for the editorial page of The Times. During the spring and summer of 2002, Kristof wrote several columns criticizing the FBI's investigation. From May through July 2002, Kristof focused his attention on the FBI's handling of information related to a man he called "Mr. Z." According to Kristof, circumstantial evidence pointed to Mr. Z, who was widely suspected by other scientists of involvement in the anthrax mailings. In Kristof's opinion, the FBI had not moved aggressively enough against Mr. Z. In August 2002, Kristof identified Mr. Z as Dr. Steven J. Hatfill, a research scientist employed by the Department of Defense.

A.

Kristof's columns expressed opinions about the progress of the FBI's investigation based on factual assertions concerning Hatfill. In a column published on May 24, 2002, Kristof urged his readers to "light a fire" under the FBI in its investigation of the anthrax mailings since "[e]xperts in the bioterror field are already buzzing about a handful of individuals who had the ability, access and motive to send the anthrax." According to Kristof, these experts suspected "one middle-aged American who has worked for the United States military biodefense program and had access to the labs

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[1] Because we are reviewing an order granting dismissal under Rule 12(b)(6), we accept as true the allegations in Hatfill's complaint. *See Papasan v. Allain*, 478 U.S. 265, 283 (1986).

at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attack." According to Kristof, the FBI had been "painstakingly slow in its investigation" of this person and unnamed others. J.A. 22.

Kristof repeated this theme in a column published on July 2, 2002, writing that "the bureau's lackadaisical ineptitude in pursuing the anthrax killer continues to threaten America's national security by permitting him to strike again or, more likely, to flee to Iran or North Korea." As to the identity of this killer, Kristof offered the following:

> Some in the biodefense community think they know a likely culprit, whom I'll call Mr. Z. Although the bureau has polygraphed Mr. Z, searched his home twice and interviewed him four times, it has not placed him under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters.
>
> ....
>
> ... People in the biodefense field first gave Mr. Z's name to the bureau as a suspect in October, and I wrote about him elliptically in a column on May 24.
>
> He denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot. Some of his polygraphs show evasion, I hear, although that may be because of his temperament.

> If Mr. Z were an Arab national, he would have been imprisoned long ago. But he is a true-blue American with close ties to the U.S. Defense Department, the C.I.A. and the American biodefense program. On the other hand, he was once caught with a girlfriend in a biohazard "hot suite" at Fort Detrick, surrounded only by blushing germs.

Kristof argued that the FBI's handling of this information reflected a casual approach to the investigation. "With many experts buzzing about Mr. Z behind his back, it's time for the F.B.I. to make a move: either it should go after him more aggressively, sifting thoroughly through his past and picking up loose threads, or it should seek to exculpate him and remove this cloud of suspicion." J.A. 23.

Having called the FBI to account for the slow pace of its investigation, Kristof put a series of rhetorical questions to the FBI concerning Mr. Z particularly:

> *Do you know how many identities and passports Mr. Z has and are you monitoring his international travel?* I have found at least one alias for him, and he has continued to travel abroad on government assignments, even to Central Asia.
>
> *Why was his top security clearance suspended in August, less than a month before the anthrax attacks began?* This move left him infuriated. Are the C.I.A. and military intelligence agencies cooperating fully with the investigation?

Have you searched the isolated residence that he had access to last fall? The F.B.I. has known about this building, and knows that Mr. Z gave Cipro to people who visited it. This property and many others are legally registered in the name of a friend of Mr. Z, but may be safe houses operated by American intelligence.

Have you examined whether Mr. Z has connections to the biggest anthrax outbreak among humans ever recorded, the one that sickened more than 10,000 black farmers in Zimbabwe in 1978-80? There is evidence that the anthrax was released by the white Rhodesian Army fighting against black guerillas, and Mr. Z has claimed that he participated in the white army's much-feared Selous Scouts. Could rogue elements of the American military have backed the Rhodesian Army in anthrax and cholera attacks against blacks? Mr. Z's resume also claims involvement in the former South African Defense Force; all else aside, who knew that the U.S. Defense Department would pick an American who had served in the armed forces of two white-racist regimes to work in the American biodefense program with some of the world's deadliest germs?

J.A. 23.

In his July 12, 2002 column, Kristof suggested that Mr. Z might have been involved in a previous attack against B'nai B'rith offices in April 1997:

When someone expert in bio[ ]warfare mailed anthrax last fall, it may not have been the first time he had struck.

So while the F.B.I. has been unbelievably lethargic in its investigation so far, any year now it will re-examine the package that arrived on April 24, 1997, at the B'nai B'rith headquarters in Washington. The package contained a petri dish mislabeled "anthracks." The dish did not contain anthrax. But a Navy lab determined that it was bacillus cereus, a very close, non-toxic cousin of anthrax used by the Defense Department.

Anybody able to obtain bacillus cereus knew how to spell "anthrax." An echo of that deliberate misspelling came last fall when the anthrax letters suggested taking "penacillin."

The choice of B'nai B'rith probably was meant to suggest Arab terrorists, because the building had once been the target of an assault by Muslim gunmen. In the same way, F.B.I. profilers are convinced that the real anthrax attacks last year were conducted by an American scientist trying to pin the blame on Arabs.

In a column on July 2 I wrote about "Mr. Z," an American bio[ ]defense insider who intrigues investigators and whose career has been spent in the shadowy world of counterterror and intelligence. He denies any involvement in the anthrax attacks.

> On the date the perpetrator chose for the B'nai B'rith attack, a terrorism seminar was under way in the Washington area and Mr. Z seemed peeved that neither he nor any other bio[ ]defense expert had been included as a speaker. The next day, Mr. Z sent a letter to the organizer saying that he was "rather concerned" at the omission and added: "As was evidenced in downtown Washington D.C. a few hours later, this topic is vital to the security of the United States. I am tremendously interested in becoming more involved in this area...."
>
> Over the next couple of years, Mr. Z has used the B'nai B'rith attack to underscore the importance of his field and his own status within it. "Remember B'nai B'rith," he noted at one point. In examples he gave of how anthrax attacks might happen, he had a penchant for dropping Arab names.
>
> The F.B.I. must be on top of the B'nai B'rith episode, right? Well, it was told about it months ago. But B'nai B'rith says it hasn't been asked about the incident by the F.B.I.

Kristof also suggested that Mr. Z might have been involved with another set of "anthrax hoaxes" in February 1999:

> In contrast to the 1997 package with fake anthrax gelatin, the 1999 letters each contained a teaspoon of fake anthrax powder (roughly the same amount as of real anthrax in 2001). That's interesting because as of 1997,

> U.S. bio[ ]defense scientists were working basically only with wet anthrax, while by 1999 some had experimented with making powders.
>
> For example, Mr. Z apparently learned about powders during those two years. His 1999 resume adds something missing from the 1997 version: "working knowledge of wet and dry BW biological warfare agents, large-scale production of bacterial, rickettsial and viral BW pathogens and toxins."

J.A. 24-25.

The next week Kristof wrote that Mr. Z had been interviewed by the FBI four times and that his home had been searched twice during the course of the investigation. Kristof noted that the Army had hired Mr. Z in 1997 to work with Ebola and Marburg viruses, even though he had previously worked with the armed forces of Rhodesia and apartheid South Africa. J.A. 27.

Finally, on August 13, 2002, Kristof identified his Mr. Z as Dr. Steven J. Hatfill:

> It's time for me to come clean on "Mr. Z."
>
> Since May, I've written periodically about a former U.S. Army scientist who, authorities say privately, has become the overwhelming focus of the investigation into the anthrax attacks last fall. I didn't name him.
>
> But over the weekend, Mr. Z named himself. He is Steven J. Hatfill, 48, a prominent germ

warfare specialist who formerly worked in the Army labs at Fort Detrick, Md. Hatfill made a televised statement on Sunday, describing himself as "a loyal American" and attacking the authorities and the media for trying "to smear me and gratuitously make a wasteland of my life."

The first thing to say is that the presumption of innocence has already been maimed since 9/11 for foreign Muslims, and it should not be similarly cheapened with respect to Dr. Hatfill. It must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of traditional physical evidence linking him to the attacks.

Still, Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax "fall guy." The authorities' interest in Dr. Hatfill arises from a range of factors, including his expertise in dry biological warfare agents, his access to Fort Detrick labs where anthrax spores were kept (although he did not work with anthrax there) and the animus to some federal agencies that shows up in his private writings. He has also failed three polygraph examinations since January, and canceled plans for another polygraph exam two weeks ago.

So far, the only physical evidence is obscure: smell. Specially trained bloodhounds were given scent packets preserved from the anthrax letters and were introduced to a variety of people and locations. This month,

they responded strongly to Dr. Hatfill, to his apartment, to his girlfriend's apartment and even to his former girlfriend's apartment, as well as to restaurants that he had recently entered (he is under constant surveillance). The dogs did not respond to other people, apartments or restaurants.

Putting aside the question of Dr. Hatfill and the anthrax, there are two larger issues.

First is the F.B.I.'s initial slowness in carrying out the anthrax investigation. Why did it take nine months to call in the bloodhounds, or to read Dr. Hatfill's unpublished novel, "Emergence," which has been sitting in the copyright office since 1998 and draws on his experiences in South Africa and Antarctica to recount a biological warfare attack on Congress?

Second is the need for much greater care within the U.S. biodefense program. Dr. Hatfill's resume made claims (a Ph.D. degree, work with the U.S. Special Forces, membership in Britain's Royal Society of Medicine) that appear false, but they were never checked.

Moreover, what was a man like Dr. Hatfill who had served in the armed forces of two white racist governments (Rhodesia and South Africa) doing in a U.S. Army lab working with Ebola? ...

....

> To its credit, in the last few months, the bureau has finally picked up its pace. Its experts in Quantico are belatedly examining anthrax hoax letters sent in 1997 and 1999 that bear fascinating resemblances to the real anthrax letters. Investigators are looking at another hoax letter with intriguing parallels to the real one; that hoax letter was sent to Senator Tom Daschle from London in mid-November, when Dr. Hatfill was visiting a biodefense center in England.
>
> Partly because of the newfound energy, the F.B.I. has lately been enjoying genuine progress in its anthrax investigation. People very close to Dr. Hatfill are now cooperating with the authorities, information has been presented to a grand jury, and there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him.

J.A. 28-29. As this column illustrates, Kristof's argument about the progress of the FBI's investigation of the anthrax mailings had much to do with specific allegations concerning Hatfill.

B.

On June 18, 2003, Hatfill filed suit against Kristof and The Times in Virginia state court. The complaint in that case alleged that "Defendants' false and reckless public identification of Dr. Hatfill as the likely anthrax mailer imputed homicidal activity to Dr. Hatfill and impugned his good name as a physician and bio[ ]medical researcher, and thereby constituted, separately, defamation, defamation per

se, and defamation by false light." In addition, the complaint alleged that Kristof's "intentional public denunciation of Dr. Hatfill as the likely anthrax murderer regardless of whether Dr. Hatfill was guilty or innocent" constituted intentional infliction of emotional distress. Hatfill sought at least $1 million in compensatory damages, the same amount in punitive damages, and costs. Hatfill never served this complaint on the defendants and instead took a voluntary nonsuit on March 9, 2004.

Hatfill filed this lawsuit on July 13, 2004, asserting claims for defamation and intentional infliction of emotional distress. Count One alleges that "Defendants' false and reckless public identification of Dr. Hatfill with the anthrax mailings, both directly and by implication from the manner in which his personal and professional background were presented in the 'Mr. Z' columns, constituted a false factual allegation of terrorist and homicidal activity and impugned Dr. Hatfill's good name as a citizen, a physician and a bio[ ]medical researcher to a reasonable reader." Count Two alleges that each of eleven discrete factual statements in Kristof's columns "constituted defamation per se that, in the mind of the reasonable reader, would tend to incriminate Dr. Hatfill in the anthrax mailings." Count Three alleges that Kristof's suggestion that Hatfill was responsible for the anthrax attacks of 2001 constituted intentional infliction of emotional distress. Hatfill seeks an unspecified amount of compensatory and punitive damages.

Hatfill voluntarily dismissed Kristof as a defendant in this case when it became clear that the district court lacked personal jurisdiction over him. The district court later dismissed Hatfill's complaint against The Times under Rule 12(b)(6). According to the district court, Count One failed as a matter of law because Kristof's columns, when read in their entirety and in context, could not reasonably be read as

accusing Hatfill of being responsible for the anthrax attacks. The columns merely reported on an ongoing investigation that targeted Hatfill, and Kristof was careful to disavow any conclusion of Hatfill's guilt. Count Two failed because the claims concerning discrete statements in Kristof's columns were not preserved in the state-court complaint and thus are time-barred. Even if they were timely, the district court ruled that none of these discrete factual allegations is sufficient to constitute defamation. Finally, the district court dismissed Count three of the complaint on the grounds that publication of commentary on a matter of public concern is not outrageous conduct and Hatfill had failed to allege sufficiently severe emotional distress. This appeal followed.

II.

We review *de novo* the district court's dismissal of Hatfill's complaint. A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We must accept as true all well-pleaded allegations and view the complaint in the light most favorable to Hatfill. *See Papasan*, 478 U.S. at 283.

The district court stated that "[t]his standard is to be applied with particular care" in reviewing defamation claims. To the extent that the district court applied a stricter standard to Hatfill's complaint than the ordinary standards under Rule 12(b)(6), that was error. A defamation complaint, like any other civil complaint in federal court, must provide "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed.R.Civ.P. 8(a)(2), sufficient to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley*, 355 U.S. at 47. While the Federal Rules of Civil Procedure require more specific

pleading in certain cases, defamation cases are not among them. *See* Fed.R.Civ.P. 9(b). Thus, the usual standards of notice pleading apply in defamation cases such as this one. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-14 (2002) (rejecting the argument that a heightened pleading standard should apply in employment discrimination cases); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting the argument that a heightened pleading standard should apply in § 1983 actions against municipalities).[2] We review the allegations of Hatfill's complaint to determine whether they state claims upon which relief may be granted under Virginia law.[3]

A.

Count One alleges that The Times' publication of Kristof's columns defamed Hatfill by implying that Hatfill was involved in the anthrax mailings. Under Virginia law, a plaintiff seeking to recover for defamation *per se* must allege a publication of false information concerning the plaintiff that tends to defame the plaintiff's reputation. *See Chapin v.*

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[2] The leading commentators have recognized that "[t]he notion that a federal court can use a stricter pleading standard on a motion to dismiss a disfavored action has been cast in serious doubt--indeed, it may well have been rendered invalid by the Supreme Court's 1993 decision in [*Leatherman*] ... and its 2002 decision in [*Swierkiewicz*].... In both cases the Court makes it clear that Rule 8 announces a pleading standard that is applicable to all cases except those governed by Rule 9(b) or a heightened pleading requirement in a federal statute." 5B Charles A. Wright & Arthur R. Miller, *Federal Prac. & Proc.: Civil 3d* § 1357, at 732 (3d ed. 2004).

[3] Although there was some question whether Hatfill's claims were governed by the law of Virginia or New York, the parties proceeded on the assumption that Virginia law governs. The district court applied Virginia law, and the parties do not suggest that we do otherwise.

Knight-Ridder, Inc., 993 F.2d 1087, 1092 (4th Cir. 1993) (citing *The Gazette, Inc. v. Harris*, 325 S.E.2d 713 (Va. 1985)). The district court dismissed Count One because "[t]he columns are not reasonably capable of being understood to convey either an accusation that plaintiff is the anthrax mailer, or an intention by the author to make such an accusation."[4]

The question whether a statement is capable of having a defamatory meaning is a question of law to be decided by the court. *Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998). Under Virginia law, the following kinds of statements are actionable as defamation *per se*: (1) statements that "impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished," (2) statements that "impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society," (3) statements that "impute to a person unfitness to perform the duties of an office or employment of

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[4] We take as true Hatfill's allegations that both the implication of involvement in the anthrax mailings and the particular factual assertions (identified in Count Two) from which that implication arises are false. *See Chapin*, 993 F.2d at 1092 ("On a motion to dismiss a libel suit because of no actionable statement, the court must of course credit the plaintiff's allegation of the factual falsity of a statement."). Moreover, we note that all of the columns at issue "concern" Hatfill, even though only one of the columns actually identifies him by name. *See The Gazette, Inc.*, 325 S.E.2d at 738 (stating that a plaintiff alleging defamation "need not show that he was mentioned by name in the publication" and that it is sufficient to show that "the publication was in its description or identification such as to lead those who knew or knew of the plaintiff to believe that the article was intended to refer to him"); *see also WJLA-TV v. Levin*, 564 S.E.2d 383, 390 (Va. 2002) (noting that a plaintiff may rely upon statements made before his actual identification, so long as such statements were made by the same defendant concerning the same subject or event over a short period of time).

profit, or want of integrity in the discharge of duties of such an office or employment," and (4) statements that "prejudice such person in his or her profession or trade." *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 591 (Va. 1954).

It is not always clear whether particular words actually charge a person with a crime of moral turpitude or unfitness for employment or the like, but the general rule of interpretation is that "allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used." *Id.* at 591-92. A defamatory charge may be made expressly or by "inference, implication or insinuation." *Id.* at 592. In short, "it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." *Id.* Accordingly, we have stated that courts applying Virginia defamation law should consider not only the words themselves but also the "inferences fairly attributable" to them. *Wells v. Liddy*, 186 F.3d 505, 523 (4th Cir. 1999).

"In determining whether the words and statements complained of ... are reasonably capable of the meaning ascribed to them by innuendo, every fair inference that may be drawn from the pleadings must be resolved in the plaintiff's favor." *Carwile*, 82 S.E.2d at 592. Even so, "the meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation. The province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain." *Id.*

Hatfill contends that Kristof's columns defamed him by imputing to him the commission of crimes of moral turpitude, namely, the murders of five people who were exposed to the anthrax letters. If the columns fairly can be read to make such a charge, then they are defamatory *per se*. *Cf. Schnupp v. Smith*, 457 S.E.2d 42, 45-47 (Va. 1995) (holding that a charge of aiding and abetting in the possession of narcotics was defamatory *per se*); *Great Coastal Express, Inc. v. Ellington*, 334 S.E.2d 846, 849 (Va. 1985) (holding that a charge of commercial bribery was defamatory *per se*). "In determining whether or not the language does impute a criminal offense the words must be construed in the plain and popular sense in which the rest of the world would naturally understand them." *Schnupp*, 457 S.E.2d at 46 (internal quotations omitted). Thus, while Kristof's columns need not "make the charge in express terms," they must "naturally and presumably be understood by those who [read] them as charging a crime." *Id.* (internal quotations omitted).

The plaintiff in *Carwile* was an attorney who made charges of graft in the Richmond, Virginia police department. 82 S.E.2d at 589. After the grand jury declined to return an indictment, the defendant newspaper reported that two city officials declined to comment on whether they were considering a recommendation to the Virginia State Bar that Carwile be disciplined for making the accusation. *Id.* The newspaper then reported that "[u]nder the State Code, the State Bar as an administrative agency of the Supreme Court of Appeals may request a court of competent jurisdiction to disbar an attorney for violation of the ethical code governing the professional conduct of attorneys." *Carwile*, 82 S.E.2d at 589-90. The newspaper did not argue explicitly that the state bar *should* take action, only that it was authorized by law to do so. The Supreme Court of Virginia ruled that

> it is a reasonable implication of this language, read in connection with the whole article, that the plaintiff is guilty of unethical and unprofessional conduct for his charges made against the Police Department; for which conduct the defendant suggests in a veiled but pointed way that the plaintiff could and should be subjected to disbarment proceedings.... While the defamatory language does not in express terms charge the plaintiff with a breach of his professional honor, yet, when aided by the innuendo, operating within the scope of its legitimate functions, it does impute conduct tending to injure him in his profession.

Id.

The plaintiff in *Schnupp* alleged defamation arising from a police officer's statements to the plaintiff's employer suggesting that the plaintiff had committed a crime punishable by imprisonment. 457 S.E.2d at 43. During a surveillance in a high-drug-crime area, the officer had observed what he believed were narcotics transactions occurring near a company van driven by the plaintiff. *Id.* at 43-44. The officer later contacted the plaintiff's employer and reported what he had seen. Specifically, the officer told the employer that he had seen the plaintiff driving a van to a particular location, that his passenger got out of the van, and that his passenger then made some type of exchange. *Id.* at 45. The officer argued that his statements merely described his observation that the plaintiff was present in the van and did not suggest that the plaintiff had actually bought or sold drugs. Since mere presence at the scene of a crime is not itself a crime of moral turpitude, his statements could not be defamatory. *Id.* Rejecting this argument, the Supreme Court

of Virginia held that the officer's statement to the employer, "unaided by innuendo but assisted by the reasonable inferences to be drawn from the words used, while not charging a criminal offense in express terms, did impute to [the plaintiff] the commission of the offense of aiding and abetting in the possession of narcotics." *Schnupp*, 457 S.E.2d at 46.

We applied this Virginia law in *Wells*, where a former secretary at the Democratic National Committee sued radio personality and Watergate conspirator G. Gordon Liddy, alleging that he had defamed her by telling public audiences that she helped procure prostitutes for visitors to party headquarters in Washington. 186 F.3d at 512-18. During one speech, Liddy stated that the surveillance camera positioned at the nearby Howard Johnson's motel

> looked directly down at a desk of a secretary named Maxine Wells, and her telephone. They had a telescopic lens camera pointed at that. And that is where the wiretap was subsequently found by the [D]emocrats on that phone.... Some members of the DNC were using the call girl ring as an asset to entertain visiting firemen. And to that end that they had a manila envelope that you could open or close by wrapping a string around a wafer. And in that envelope were twelve photographs of an assortment of these girls and then one group photograph of them. And what you see is what you get. It was kept ... in that desk of Ida Maxine Wells. Thus, the camera and all the rest of it. And what they were doing is as these people would be looking at the brochure, if you want to call it that, and making the telephone call to arrange

> the assignation [,] that was being wiretapped, recorded and photographed.

Id. at 523. We concluded that these words were "capable of defamatory meaning, namely, that Wells was a participant in a scheme to procure prostitutes." *Id.* Liddy had not explicitly accused Wells of complicity in the alleged call-girl operation, but he implied as much by asserting that the manila envelope was kept in her desk.

Considered in light of *Carwile*, *Schnupp*, and *Wells*, Hatfill's complaint adequately alleges that Kristof's columns, taken together, are capable of defamatory meaning. The columns did not describe any other actual or potential target of investigation, and they recounted detailed information pertaining to Hatfill alone. Once Kristof named Hatfill as Mr. Z (and perhaps even before that time), a reasonable reader of his columns could believe that Hatfill had the motive, means, and opportunity to prepare and send the anthrax letters in the fall of 2001; that he had particular expertise with powder forms of anthrax, the type used in the mailings; that his own anthrax vaccinations were current; that he was the prime suspect of the biodefense community as well as federal investigators; that he had failed numerous polygraph examinations; that specially trained bloodhounds had "responded strongly" to Hatfill, his apartment, and his girlfriend's apartment but not to anyone else or any other location; and that Hatfill was probably involved in similar anthrax episodes in recent years. Based on these assertions, a reasonable reader of Kristof's columns likely would conclude that Hatfill was responsible for the anthrax mailings in 2001.[5]

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[5] At this stage of the litigation, there is no evidence to show whether or to what extent Kristof's columns were, as the district court stated, "accurate report[s] of [an] ongoing investigation." A court considering whether a

Notwithstanding Kristof's attribution of certain allegations to unnamed sources, or his caution that readers should entertain a presumption of Hatfill's innocence, or even his statement that the FBI should "end this unseemly limbo by either exculpating Dr. Hatfill or arresting him," the unmistakable theme of Kristof's columns is that the FBI should investigate Hatfill more vigorously because all the evidence (known to Kristof) pointed to him. Just as a defendant cannot escape liability for making a false assertion of fact by prefacing that assertion with the words "in my opinion," *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990),[6] neither can it escape liability simply by pairing a

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statement is capable of defamatory meaning must confine itself to the allegedly defamatory statement and the fair inferences and innuendoes derived from it. *See Schnupp*, 457 S.E.2d at 46; *Carwile*, 82 S.E.2d at 591-92. In this case, the columns themselves show that Kristof's thesis was not that the official investigation targeted Hatfill; rather, it was that the official investigation should be targeting Hatfill more vigorously, if not exclusively, because the available evidence pointed to him. In describing all this evidence, Kristof's columns did not merely report others' suspicions of Hatfill; they actually *generated* suspicion by asserting facts that tend to implicate him in the anthrax murders.

[6] The Court in *Milkovich* made clear that a statement may be defamatory even if it seems merely to state an opinion:

> If a speaker says, "In my opinion John is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

497 U.S. at 18-19. Although the Court declined to create a rigid distinction between statements of fact and expressions of opinion, it did note that "a statement on matters of public concern must be provable as

charge of wrongdoing with a statement that the subject must, of course, be presumed innocent, *see Carwile*, 82 S.E.2d at 592 (stating that "it matters not how artful or disguised the modes in which the meaning is concealed it if is in fact defamatory").

For purposes of Rule 12(b)(6), the question is simply whether Kristof's columns are capable of defamatory meaning under Virginia law, *i.e.*, whether they imputed to Hatfill the commission of a crime involving moral turpitude. They did, and much more forcefully than the statements at issue in *Carwile* and *Wells*. Because Kristof's columns, taken together, are capable of defamatory meaning under Virginia law, the district court erred in dismissing Count One.[7]

B.

Count Two alleges that each of eleven discrete factual assertions contained in Kristof's columns separately defamed Hatfill by incriminating him in the anthrax mailings. The

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false before there can be liability under state defamation law, at least in situations ... where a media defendant is involved." *Id.* at 19-20. The allegedly defamatory charge in this case – that Hatfill was responsible for the anthrax mailings – is provable as false and thus may be the subject of a defamation claim under *Milkovich*.

[7] Contrary to the district court's assertion, it is immaterial whether Kristof actually intended to defame Hatfill. We stated in *Chapin* that "a libel-by-implication plaintiff must make an especially rigorous showing *where the expressed facts are literally true*. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference." 993 F.2d at 1092-93 (emphasis added). In this case, Hatfill alleges *both* that the inference – that he was responsible for the anthrax mailings--is false *and* that the factual assertions from which that inference arises are false. Since the district court was required to accept Hatfill's assertion that the facts upon which Kristof based his defamatory charge were false, *id.* at 1092, *Chapin* is inapposite.

district court dismissed this count on the grounds that (1) the statute of limitations barred any claims other than the claim asserted in Count One and (2) none of the eleven statements is independently capable of defamatory meaning.

1.

Hatfill's defamation claims are subject to a one-year statute of limitations. *See* Va. Code Ann. § 8.01-247.1. Hatfill's claims accrued when Kristof's columns were published--between May and August 2002. *See Jordan v. Shands*, 500 S.E.2d 215, 218 (Va. 1998). Thus, Hatfill had until August 2003 (at the latest) to assert his defamation claims. Yet he did not file this complaint until July 2004.

Under Virginia law, however, a plaintiff who voluntarily withdraws a state-court action and recommences it in federal court within six months may toll the statute of limitations as of the date he filed the initial state-court action. Va. Code Ann. § 8.01-229(E)(3).[8] Hatfill filed a lawsuit in state court on June 18, 2003; took a nonsuit on March 9, 2004; and commenced this action in federal court on July 13, 2004. Thus, the one-year statute of limitations was tolled as of June 18, 2003.

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[8] Section 8.01-229(E)(3) provides as follows: "If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380, the statute of limitations with respect to such actions shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date of the order entered by the court, or within the original period of limitation, or within the limitation period as provided by subdivision (B)(1), whichever period is longer. This tolling provision shall apply irrespective of whether the action is originally filed in a federal or state court and recommenced in any other court, and shall apply to all actions irrespective of whether they arise under common law or statute."

The district court ruled, however, that this tolling provision saved only the claim relating to the overall implication of Kristof's columns and not the claim relating to discrete false statements. According to the district court, since the initial complaint asserted only a single cause of action for defamation alleging that "[d]efendants' false and reckless public identification of Dr. Hatfill as the likely anthrax mailer imputed homicidal activity to Dr. Hatfill and impugned his good name," only that claim was saved by the tolling provision.

Section 8.01-229(E)(3), the tolling provision at issue here, applies when the plaintiff "suffers a voluntary nonsuit as prescribed in § 8.01-380." Section 8.01-380 authorizes a plaintiff to take a nonsuit on any "cause of action," and the Virginia Supreme Court defines a "cause of action" as "a set of operative facts which, under the substantive law, may give rise to one or more rights of action," *Roller v. Basic Constr. Co.*, 384 S.E.2d 323, 326 (Va. 1989).[9]

When Hatfill took a voluntary nonsuit in his original state-court action, he did so with respect to the set of operative facts underlying his complaint, namely, the defendants' publication of Kristof's columns. When he filed this lawsuit in federal court, the tolling provision saved all rights of action arising from that cause of action, including the right of action alleged in Count Two. See *Odeneal v.*

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[9] The Virginia Supreme Court distinguishes causes of action from rights of action: "A right of action is a remedial right to presently enforce a cause of action. There can be no right of action until there is a cause of action." *Stone v. Ethan Allen, Inc.*, 350 S.E.2d 629, 631 (Va. 1986) (internal citations omitted). "Unless otherwise provided by statute, traditional statutes of limitations begin to run, not when a wrongful act is done, but when injury or damage results from it and the cause of action has thus ripened into a right of action." Roller, 384 S.E.2d at 327-28.

Thompson, 2003 WL 22518523, at *2 (Va. Cir. Ct. Aug.6, 2003). Thus, the district court erred in ruling that the statute of limitations barred Count Two of Hatfill's complaint.

2.

The district court further erred in ruling that none of the eleven statements identified by Hatfill is independently capable of defamatory meaning. Broadly grouped, Hatfill complains about five sets of factual assertions in Kristof's columns. First, Hatfill complains about Kristof's assertion that he had the ability, access, and motive to make and send the anthrax. Second, Hatfill complains about Kristof's statement that he had access to an "isolated residence" where he gave Cipro to visitors. Third, Hatfill complains about the allegation that he had up-to-date anthrax vaccinations himself. Fourth, Hatfill complains about Kristof's charge that he failed three polygraph examinations in 2002. Finally, Hatfill complains about the allegation that he "was once caught with a girlfriend in a biohazard 'hot suite' at Fort Detrick ... surrounded only by blushing germs."

Taken in the context of the columns in which they appear, and considered in light of *Carwile*, *Schnupp*, and *Wells*, all of these statements but one are capable of incriminating Hatfill in the anthrax mailings. With the exception of the final statement--that Hatfill had been caught with a girlfriend in a biohazard hot suite at Fort Detrick--these statements link Hatfill to anthrax generally and the investigation specifically and give rise to an inference that he was involved in the anthrax mailings. By contrast, the statement describing Hatfill's activities with his girlfriend does not connect Hatfill to anthrax in any way. Although this statement might be capable of some other defamatory meaning, it does not incriminate Hatfill in the anthrax mailings and so is not actionable under this complaint.

C.

Count Three alleges that the publication of Kristof's columns constituted intentional infliction of emotional distress. The district court dismissed this count on two grounds: first, that publication of defamatory charges is not sufficiently outrageous conduct, and second, that Hatfill failed to allege severe emotional distress.

A plaintiff seeking to recover for intentional infliction of emotional distress under Virginia law must allege that (1) the defendant's conduct was intentional and reckless; (2) the conduct was outrageous and intolerable; (3) the conduct caused the plaintiff's emotional distress; and (4) the plaintiff's distress was severe. *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991); *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974). Hatfill plainly alleged that The Times engaged in intentional and reckless conduct and that such conduct caused his emotional distress. The Times argues, however, that the complaint fails to allege conduct that qualifies as "outrageous" under Virginia law and emotional distress so severe that Virginia law would permit recovery.

1.

Virginia law limits the kinds of conduct that will support a claim for intentional infliction of emotional distress. The Supreme Court of Virginia has stated that a defendant may be liable for intentional infliction of emotional distress "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Russo*, 400 S.E.2d at 162. It is not enough that the defendant acted with tortious or even criminal intent. *Id.* Nor does liability extend to "mere insults, indignities, threats, annoyances, petty oppressions, or

other trivialities." *Gaiters v. Lynn*, 831 F.2d 51, 53 (4th Cir. 1987) (applying Virginia law) (internal quotations omitted). The question whether the defendant's conduct is so extreme and outrageous as to permit recovery is a question of law for the court. *Womack*, 210 S.E.2d at 148.

The district court's conclusion that "[p]ublishing news or commentary on matters of public concern" can *never* be sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress sweeps too broadly. Depending upon the circumstances surrounding the publication and the nature of the defamatory charge, a defamatory publication could be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *Russo*, 400 S.E.2d at 162. Accepting Hatfill's allegations as true, The Times intentionally published false charges accusing him of being responsible for anthrax mailings that resulted in five deaths, without regard for the truth of those charges and without giving Hatfill an opportunity to respond. Given the notoriety of the case, the charge of murder, and the refusal to permit comment by Hatfill's counsel, we conclude that the alleged misconduct is extreme or outrageous under Virginia law. *Compare Baird v. Rose*, 192 F.3d 462, 473 (4th Cir. 1999) (applying Virginia law) (reversing dismissal of an intentional-infliction-of-emotional-distress claim where the plaintiff alleged that her teacher intentionally humiliated her, knowing that she suffered from clinical depression).

The Times argues that Hatfill cannot use an intentional-infliction-of-emotional-distress claim to avoid constitutional limitations on defamation actions. We are confident, however, that the relevant constitutional limitations cannot be avoided as easily as The Times imagines. If Hatfill ultimately cannot prevail on his defamation claims because he is unable to satisfy constitutional requirements for

recovery, then he likely will be unable to prove that The Times' misconduct was intentional or reckless or that such misconduct was sufficiently outrageous to warrant recovery. At this stage of litigation, our sole concern is whether Hatfill's allegations, taken as true, describe intentional and outrageous misconduct. We conclude that they do.

2.

The Times also contends that Hatfill failed to allege severe emotional distress sufficient to permit recovery under Virginia law. Under Virginia law, "liability arises only when the emotional distress is extreme, and only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Russo*, 400 S.E.2d at 162. A plaintiff in Virginia state court must plead "with the requisite degree of specificity" the facts giving rise to his claim of severe emotional distress. *Jordan*, 500 S.E.2d at 219. In *Russo*, for example, the Supreme Court of Virginia held that the plaintiff's allegations that "she was nervous, could not sleep, experienced stress and 'its physical symptoms,' withdrew from activities, and was unable to concentrate at work" were insufficient to avoid a demurrer on her claim for intentional infliction of emotional distress. 400 S.E.2d at 163. It was important to the court that the plaintiff had not alleged "that she had any physical injury caused by the stress, that she sought medical attention, that she was confined at home or in a hospital, or that she lost income." *Id.*

Hatfill did not allege his emotional distress in such specific terms, but Rule 8 – applicable in this diversity case – did not require him to do so. *See Swierkiewicz*, 534 U.S. at 513. The complaint alleges that "[a]s a result of defendants' defamation here at issue, Dr. Hatfill has suffered severe and ongoing loss of reputation and professional standing, loss of employment, past and ongoing financial injury, severe

emotional distress and other injury." The complaint further alleges that publication of Kristof's columns inflicted "grievous emotional distress" upon Hatfill. These allegations are sufficient under Rule 8 to give The Times "fair notice of what [Hatfill's] claim is and the grounds upon which it rests," *id.* at 512 (citing *Conley*, 355 U.S. at 47), and they are adequate to state the final necessary element of a claim for intentional infliction of emotional distress.

III.

Hatfill's complaint adequately alleges claims for defamation and intentional infliction of emotional distress based on The Times' publication of columns implicating Hatfill in the anthrax mailings of 2001. Accordingly, we reverse the district court's order granting dismissal and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

NIEMEYER, Circuit Judge, dissenting:

Dr. Steven Hatfill's defamation complaint alleges at bottom that four columns written by columnist Nicholas Kristof and published in the *New York Times* during the period from July to August 2002 accused Dr. Hatfill of being the anthrax murderer. The essential question therefore is whether these columns, taken together or individually, may fairly be read to accuse Dr. Hatfill of the murders. Because I can find nothing in the letter or spirit of the columns that amounts to such an accusation, I would affirm.

The columns, when read fairly, send the message:

(1) that the FBI's investigation of the anthrax murders was lackadaisical and unimaginative;

(2) that the FBI should have begun pursuing obvious leads that created suspicion about Dr. Hatfill and that, based on circumstantial evidence, Dr. Hatfill should have been the leading suspect; and

(3) that, while there was circumstantial evidence pointing to Dr. Hatfill, no "traditional physical evidence linking him to the attacks" existed and that there "must [have been] a genuine assumption that he [was] an innocent man caught in a nightmare." Nicholas Kristof, *The Anthrax Files*, N.Y. Times, Aug. 13, 2002, at A19.

These points were amplified by examples of suspicious circumstances, but nowhere does any column accuse Dr. Hatfill of committing the murders. The columns' purpose was to put into operation prosecutorial machinery that would determine whether Dr. Hatfill committed the crimes and "end this unseemly limbo by either exculpating Dr. Hatfill or arresting him." *Id.*

We, of course, must accept at this stage of the case the allegations that Kristof's columns contained some factual inaccuracies. But whether Kristof's descriptions of the various items of circumstantial evidence were accurate is irrelevant because (1) inaccurately reporting the suspicious circumstances surrounding a suspect does not amount to inaccurately accusing – either expressly or impliedly – the suspect of actually committing the crime, and (2) historical circumstances recounted in the columns and not disputed by Dr. Hatfill were sufficient to support the columns' stated

suspicion about him. Reporting suspicion of criminal conduct – even elaborately and sometimes inaccurately – does not amount to an accusation of criminal conduct as necessary to support Dr. Hatfill's claim.

Thus, I agree with the district court that the columns did not, under Virginia law, "impute to [Dr. Hatfill] the commission of some criminal offense involving moral turpitude." *Carwile v. Richmond Newspapers, Inc.*, 82 S.E.2d 588, 591 (Va. 1954). Similarly, I agree with the district court that the statements in Kristof's columns were insufficiently outrageous to support Dr. Hatfill's claims for intentional infliction of emotional distress. *See Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974). Accordingly, I would affirm the district court's order dismissing the complaint under Federal Rule of Civil Procedure 12(b)(6).

JUDGMENT

FILED: July 28, 2005

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 04-2561
CA-04-807-A

STEVEN J. HATFILL
Plaintiff – Appellant

v.

THE NEW YORK TIMES COMPANY
Defendant – Appellee

and
NICHOLAS KRISTOF
Defendant

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria

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In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

STEVEN J. HATFILL,	)
	)
Plaintiff,	)
v.	)
	)
THE NEW YORK TIMES COMPANY	)
AND	)
NICHOLAS KRISTOF,	)
	)
Defendants.	)
	)

Civil Action No. 1:04cv807

MEMORANDUM OPINION

This case is before the Court on motions of Defendants Nicholas Kristof and The New York Times Company to dismiss the complaint for failure to state a claim, and, as to Kristof, because the Court lacks personal jurisdiction over him.

This case arises out of a series of columns authored by Mr. Kristof and published in The New York Times in the summer of 2002. Kristof writes a regular column that appears on the Op-Ed page of The Times. The columns challenged here by Plaintiff Steven Hatfill, recount actions and inactions of the FBI in its still ongoing investigation of the still-unsolved anthrax mailings in fall of 2001. The columns

expressed Kristof's concerns with the failings and mistakes of the FBI and posed questions about the safety of our Nation and the prosecution of the war on terror that he believed were raised by the FBI's handling of the anthrax investigation. Kristof used the FBI's investigation of Hatfill as an example of his concerns that the FBI should complete a proper investigation so that it could either indict Hatfill or clear him of suspicion, rather than leave him and the public hanging. Hatfill now sues for libel and infliction of emotional distress, claiming the columns implied that he is, in fact, guilty of being the "anthrax mailer."

In late 2001, following the attacks on the World Trade Center and the Pentagon, anthrax-laced letters were sent through the U.S. mail to several news organizations and members of Congress. At least five people died as a result of the mailings, and the postal service was disrupted. Initially, there was much speculation about a possible connections between the anthrax attack and 9/11, and the federal government promptly launched a major investigation to track down those responsible.

The May 24 Column. More than half a year later, with no one under arrest for the anthrax mailings and the FBI's investigation on the slow track, defendant Nicholas Kristof wrote a column excoriating the administration in Washington for failing to pay enough attention to the grave dangers of bio-terrorism. His May 24 column asserted that the anthrax mailings had revealed the nation's significant vulnerability to a bio-terrorism attack.

Kristof contended that an important step toward reducing our national vulnerability would be to light a fire under the FBI, noting that there were probably only a handful of individuals who had the ability, access and motive to send the anthrax. Without naming names, Kristof generally

described one middle-aged American who had worked for the U.S. bio-defense program at Ft. Detrick and who, experts had said, unquestionably had the ability to make first-rate anthrax. Kristof criticized the FBI for being painstakingly slow in investigating the small group of people who should be checked out, and restated his point that solving the case would reduce our vulnerability to another attack. Hatfill concedes he suffered no injury from publication of this column.

The July 2 Column. Several weeks later, on July 2, 2002, Kristof devoted a second column to the significant security threat he saw in the FBI's still hapless investigation of the anthrax mailings. He criticized the FBI's "lethargy" and "lackadaisical ineptitude," which he labeled a continuing threat to America's national security.

Kristof accused the FBI of incompetence in handling the investigation, and gave several examples: allowing the destruction of anthrax stocks in Iowa that might have been a potential source of evidence, waiting months to open an envelope with important anthrax evidence, and failing to give polygraph tests systematically to scientists who might be potential suspects.

As further example of the FBI's shortcomings, Kristof noted its failure to move quickly to investigate a scientist that several people in the bio-defense field felt merited examination. Kristof did not identify the scientist, referring to him as "Mr. Z," but noted that concerned scientists had given his name to the FBI more than eight months earlier. To demonstrate how little the FBI had done, Kristof posed a number of questions about Mr. Z that the FBI had yet to investigate:

- "Do you know how many identities and passports Mr. Z has and are you monitoring his international travel?

- "Why was his top security clearance suspended in August, less than a month before the anthrax attacks began?"

- "Have you searched the isolated residence he had access to last fall"

- "Have you examined whether Mr. Z has connections to the biggest outbreak of anthrax among humans ever recorded, the one that sickened more than 10,000 black farmers in Zimbabwe in 1978-80?"

As Hatfill alleges in his Complaint, Kristof's questions about Mr. Z plainly were directed at demonstrating what he considered the inadequacy of the FBI investigation, rather than establishing the guilt of Mr. Z. The column noted expressly that Mr. Z "denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot." The column is explicit in directing its concerns at the FBI and in affirming that Mr. Z is only a suspect.

The July 12 Column. On July 12, Kristof chastised by the FBI's "unbelievable lethargic" approach to the anthrax investigation, and again provided an example of the "Keystone cops" quality of the agency's work by describing two earlier anthrax scares that had apparently received scant attention from the FBI team investigating the 2001 mailings. One prior incident involved a 1997 shipment of "anthracks" addressed to B'nai B'rith headquarters in Washington; the other involved anthrax hoax letters sent to several media outlets and government posts in 1999.

The July 12 column identified a number of facts about both of these earlier incidents that deserved investigation for possible links to the 2001 mailings, and it excoriated the FBI's inaction. Kristof noted that the day after the 1997 anthrax incident, the "Mr. Z" referred to in his earlier column had sent a letter to organizers of a terrorism conference then being held in Washington, referring to the incident and expressing his "concern" that he and other bio-defense experts had not been included in the conference, and that he had subsequently used the B'nai B'rith attack "to underscore the importance of his field and his own status within it." Kristof also noted that some envelopes from the 1999 incident were still being held by police in Columbus, Ohio, but that the FBI had failed to attempt a DNA test for saliva on the stamps that might prove or disprove a link to the 2001 mailings. Once again, as plaintiff himself alleges, Kristof's objective was not to identify the anthrax mailer but to prod the FBI into the quality of investigation required by the severity of the stakes.

The July 19 Column. The next week, Kristof used his Op-Ed platform to focus attention on a related issue of importance to our bio-security--lax government monitoring and control of those who have access in this country to deadly biological material. His July 19 column began: "It's bad enough that we can't find anthrax hidden in the Iraqi Desert. But it turns out that we also misplaced anthrax and Ebola kept in a lab outside Washington, D.C." The column documented inventory management and control problems with deadly materials used by researchers at the U.S. Army Medical Research Institute of Infectious Diseases at Ft. Detrick. Toward the end of his column, Kristof noted that he first became interested in the Ft. Detrick lab while doing research about the anthrax mailings. He learned that Mr. Z was hired in 1997 to work on the deadly Ebola and Marburg

viruses at Ft. Detrick even though "he had spent years in the armed forces of Rhodesia and apartheird South Africa."

These columns, were written in the context of a high degree of public attention focused on the anthrax investigation, and extensive reporting by news organizations, on their news pages, about specific, potential suspects. On August 11, 2002, Hatfill held a press conference to acknowledge that he was a person of interest to the FBI and to deny strenuously any involvement with the anthrax mailings. He described himself as a loyal American and decried those trying to connect him to the deadly mailings, calling himself a fall guy in the anthrax investigation. Neither Hatfill nor his attorney would answer questions about his past or accusations of fabrications on his resume, but he added that anyone's life could be picked apart for inconsistencies.

The August 13 Column. In his next column, Kristof wrote about Hatfill's press conference and acknowledged that Hatfill was the Mr. Z he had previously referred to, someone whom several bio-defense experts had identified as a person warranting investigation by the FBI. As in earlier columns, Kristof observed with some emphasis that Hatfill was only a suspect and deserved the presumption of innocence. Kristof chastised Hatfill for suggesting the FBI had casually designated him the anthrax fall guy, and repeated a number of the legitimate issues that warranted full investigation by the FBI--including Hatfill's expertise and past employment, which gave him both the ability to have conducted the mailings and potential access to anthrax spores. Kristof praised the FBI for the recent newfound energy of its anthrax investigation, and expressed the hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him.

More than a year after holding his press conference to deny responsibility for the anthrax mailings, and with no conclusion to the anthrax investigation, Hatfill filed a lawsuit against the Attorney General, the FBI and others, accusing them of libel, Privacy Act violations and related claims. His complaint in the pending lawsuit accuses the federal government of providing the press with scores of anonymous leaks detailing specific investigative procedures, including erroneous and prejudicial information about investigative procedures and their results that Hatfill alleges were provided to New York Times columnist Nicholas Kristof.

Shortly before the statute of limitations was to run with respect to Kristof's July 2002 columns, Hatfill filed suit in Virginia state court against Kristof and The Times. Motion for Judgment, Hatfill v. The New York Times Co., No. 215160, (Va. Cir. Ct., filed June 18, 2003). That lawsuit challenged only the July 2, 12, 19 and August 13 columns. Hatfill alleged in that complaint that the four columns defamed him because they state or imply that Dr. Hatfill was the anthrax mailer. Availing himself of Virginia's tolling statute, Hatfill never served or proceeded with this state action, instead taking a voluntary non-suit almost a year later, in March 2004, just prior to filing the present action in this Court.

On July 13, 2004, Hatfill commenced this action, asserting claims for libel and intentional infliction of emotional distress. The Complaint seeks damages on the basis of all five of the Kristof columns relating in any way to Hatfill. It states three causes of action:

The first cause of action, like his Motion for Judgment in state court, alleges that the columns collectively state or imply that Dr. Hatfill was the anthrax mailer, and the Kristof

wrote the columns to impute guilt for the anthrax letters to Dr. Hatfill in the minds of reasonable readers.

The second cause of action, which was not included in the earlier Motion for Judgment, alleges that Hatfill independently was defamed by a number of discrete untruths contained in the Kristof columns. In addition, the second cause of action included, as did the Motion for Judgment, the allegation that Hatfill was defamed by a reference to reports that he had once been found in a romantically compromising position in a government laboratory.

The third cause of action seeks damages for intentional infliction of emotional distress based solely on the same publications giving rise to the claims for libel. The Complaint alleges that the intentional public identification of Dr. Hatfill with the anthrax murders for the collateral purpose of lighting a fire under the government inflicted grievous emotional distress on Hatfill.

Rule 12(b)(6) directs that a complaint should be dismissed "if, after accepting all well-pleaded allegations in the plaintiff's complaint as true ... it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999); Jarno v. Lewis, 256 F. Supp. 2d 499, 501-02 (E.D. Va. 2003) (same). In considering a motion to dismiss, the Court should draw all reasonable factual inferences in favor of the plaintiff, but is not bound to accept any legal conclusions set forth in the complaint. Edwards, 178 F.3d at 244.

This standard is to be applied with particular care in assessing a claim for libel. As Professors Wright and Miller have explained:

> [There is] one significant exception to the general rule that the complaint will be construed liberally on a Rule 12(b)(6) motion ... When the claim alleged is a traditionally disfavored "cause of action," such as ... libel, or slander, the courts tend to construe the complaint by a somewhat stricter standard and [are] more inclined to grant a Rule 12(b)(6) motion to dismiss.

5B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure 2d § 1357. Indeed, the burden of defending a baseless defamation action is itself a threat to the First Amendment, so "it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted." Coles v. Washington Free Weekly, Inc., 881 F. Supp. 26, 30 (D.D.C. 1995), aff'd, 88 F.3d 1278 (D.C. Cir. 1996). Courts in Virginia and the Fourth Circuit give close scrutiny to libel claims in order to protect free speech, and they dismissed at the outset libel actions against the press that are based on constitutionally protected speech.[1]

In Count I, Plaintiff contends that the five Op-Ed columns in question collectively state or imply that Dr. Hatfill was the anthrax mailer, and thereby constituted a false

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[1] See, e.g., Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180, 186 (4th Cir. 1998) (affirming dismissal of libel claim "[b]ecause the challenged statements are constitutionally protected"); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1091-92 (4th Cir. 1993) (same); Freedlander v. Edens Broad., Inc., 734 F. Supp. 221, 224 (E.D. Va. 1990) (dismissing libel claim after weighing "first amendment interest in protecting public speech") aff'd, 923 F.2d 848 (4th Cir. 1991); Yeagle v. Collegiate Times, 497 S.E.2d 136, 137 (Va. 1998) (affirming dismissal of libel claim "subject to principles of freedom of speech arising under the First Amendment").

factual allegation of terrorist and homicidal activity by plaintiff. It is for the Court to determine, as a threshold matter, whether the challenged columns are reasonably capable of conveying this defamatory meaning. Wells v. Liddy, 186 F.3d 505, 522 (4th Cir. 1999) ("whether a statement is capable of having a defamatory meaning is a legal question" for the court to decide); Freedlander, 734 F. Supp. at 224 (same); Yeagle, 497 S.E.2d at 138 (same).[2] If so, the Court must also make an initial determination of whether the language used affirmatively suggests the author intended the defamatory meaning alleged. E.g., Chapin, 993 F. 2d at 1093.

The standard for assessing the meaning of the columns is well-settled: The Court is to apply the "plain and natural meaning" of the statements made, reading the challenged publications "as a whole" and taking into account the context in which the statements were made. Chapin, 993 F.2d at 1092-93, 1098 (citing Carwile v. Richmond Newspapers, Inc., 82 S.E.2d 588, 591-92 (Va. 1954)); see also White v. Fraternal Order of Police, 909 F.2d 512, 526 (D.C. Cir. 1990) (requiring court to "examine the entire context" of challenged publication); Hopkins v. Lapchick, 981 F. Supp. 901, 904 (D. Md. 1997) ("taking the article as a whole" to determine its reasonable meaning), aff'd by unpublished disposition, 129 F.3d 116 (4th Cir. 1997). Accordingly, on this motion, the Court must assess whether the challenged columns reasonably can be read to accuse Hatfill of actually being the anthrax mailer, based upon consideration of the full content of the columns and upon the context in which they were

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[2] While it is not entirely clear at this stage whether Virginia or New York law would apply to all or certain aspects of this matter, the law in the two jurisdictions insofar as relevant to the present motion is not at odds and, as a consequence, defendants for the purposes of the motion only proceed on the assumption that Virginia law governs.

published, i.e., as a series of opinion pieces appearing on the Op-Ed page of a national newspaper.

The threshold question for the Court is whether the columns reasonably convey the defamatory meaning that Hatfill is the anthrax mailer, not whether such an interpretation is possible or plausible. In the law of defamation, "what meaning a communication is capable of bearing" is a very different inquiry from identifying "the inferences that can reasonably be drawn from it." White v. Fraternal Order of Police, 707 F.Supp. 579, 589 n. 12 (D.D.C. 1989) (emphasis added). The court in White illustrated this "important, but subtle, point" as follows:

> If a newspaper accurately reported that an individual was arrested and charged with a crime, a reader could reasonably infer, i.e., guess, surmise, or derive as a probability, that the individual actually committed the crime. However, unless the newspaper article, considered as a whole, in context, could be reasonably understood to express that the individual in fact committed the crime, the newspaper report would not be actionable, questions of privilege aside.

Id.

The principle that an accurate report of ongoing investigation or an allegation of wrongdoing does not carry the implication of guilt has long been recognized at the common law, and it is mandated by the First Amendment. Indeed, for this reason, courts routinely dismiss libel claims against defendants who accurately report on investigations or charges made by others. See, e.g., Green v. CBS, Inc., 286 F.3d 281, 283-84 (5th Cir. 2002) (finding no claim for libel

based on accurate report of allegation of child abuse); Janklow v. Newsweek, Inc., 759 F.2d 644, 648-49 (8th Cir. 1985) (reporting girl's allegation of rape is not reasonably capable of bearing defamatory meaning that the plaintiff actually committed rape); Jewell v. NYP Holdings, 23 F. Supp. 2d 348, 369 (S.D.N.Y. 1998) (finding no libel claim based on an accurate report that plaintiff was a "prime suspect" in the Olympic bombing, even though no charges were ever filed); Basilius v. Honolulu Publ'g Co., 711 F. Supp. 548, 550-51 (D. Haw. 1989) (finding no libel claim based on an accurate report that plaintiff was accused in an anonymous letter of playing a role in an assassination); Foley v. Lowell Sun Publ'g Co., 533 N.E.2d 196, 197 (Mass. 1989) (reporting that plaintiff was charged with assaulting a police officer cannot reasonably be construed as an accusation that plaintiff actually committed the crime).

Applying this principle, it is evident that the Op-Ed pieces highlighting the perceived shortcomings of the FBI are not reasonably read as accusing Hatfill of actually being the anthrax mailer. Plaintiff is accurately described as someone who experts in the field have identified as deserving scrutiny by the FBI, and the failure to conduct a thorough investigation is mentioned as one of several examples of the FBI's ineptitude. Earlier columns raised several questions about Hatfill (then identified only as "Mr. Z"), to support Kristof's contention that the FBI needed to be more thorough and swift in its investigation, asking if the FBI yet had investigated such basic facts as why his security clearance was suspended or how many passports he holds. But, none of these accuse him of guilt, and the columns specifically caution that there may be no connection, that his friends consider him a patriot, and that a thorough FBI investigation may well exculpate him of any wrongdoing. The last column accurately describes Hatfill as the overwhelming focus of the

[FBI's] investigation into the anthrax attacks last fall. Once again, however, this column contains nothing endorsing a belief in his guilt.

In similar situations, courts in the Fourth Circuit and across the county have repeatedly rebuffed efforts to transform reports raising questions about matters of public concern into defamatory assertions of guilt. In Chapin, for example, the Court of Appeals dismissed a libel action based on a newspaper article that pointedly questioned the finances of a non-profit organization sponsoring a program to send Gift Pacs to American soldiers in Saudi Arabia, and the apparent hefty mark-up between the wholesale costs of the items in the Gift Pac and the price charged the public. 993 F.2d at 1091. Rejecting plaintiff's contention that the article implied he had defrauded the public, the Court of Appeals concluded:

> "Fundamentally, the ... article raises questions about the Gift Pac project. In the Court's view, it is a story constructed around questions, not conclusions. But the mere raising of questions is, without more, insufficient to sustain a defamation suit in these circumstances. Questions are not necessarily accusations or affronts. Nor do they necessarily insinuate derogatory answers."

Id. at 1098 (quoting district court). The Court of Appeals recognized in Chapin that journalism which "invite[s] the public to ask" questions about matters of public concern is the "paradigm of a properly functioning press." Id. at 1096. The court acknowledged that the conclusion "Chapin is a dishonest man ... was certainly within the wide rage of possibilities" flowing from defendant's article, but that is

"precisely why we need and must permit a free press to ask the question." Id.

The decision in Green v. CBS, Inc. is to the same effect. Green arose from a television news magazine report examining the problems that had befallen winners of a multi-million dollar lottery. 286 F.3d at 282. Specifically, the broadcast reported that one lottery winner had been accused of child abuse in the context of a bitter divorce in which his ex-wife sought a share of the lottery proceeds. Id. at 292-93. The ex-wife sued CBS for defamation, alleging that the broadcast implied that she had fabricated the abuse allegation in an effort to "get more money out of" her husband. Id. at 284. Affirming the dismissal of this libel claim, the Fifth Circuit held that statements accurately reporting allegations do not support a claim for a libel: "In cases involving media defendants, such as this, the defendant need not show the allegations are true, but most only demonstrate that the allegations were made and accurately reported." Id.

The columns at issue in this case perform precisely the same function as the publications at issue in Chapin and the broadcast at issue in Green: They accurately report questions being raised in the context of an ongoing public controversy. Even if the conclusion that Hatfill is indeed the anthrax mailer could conceivably be found within the range of possibilities raised by the columns, this is not a reasonable reading of the columns. Critiquing the propriety of the FBI's investigation and raising questions of legitimate concern to the public is not the same as a direct accusation of wrongdoing, and does not subject defendants to a claim for libel. E.g., Partington v. Bugliosi, 56 F.3d 1147, 1157 (9th Cir. 1995) ("inquiry itself, however embarrassing or unpleasant to its subject, is not an accusation"); Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655, 39 F.3d 191, 195 (8th Cir. 1994) (raising

the question of whether plaintiff engaged in discriminatory hiring practices is not an actionable false statement of fact).

Because Hatfill's claim of libel is based upon a defamatory implication he finds in the columns, rather than anything said directly, "[t]he language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference." Chapin, 993 F.2d at 1110. Hatfill has no claim for libel in this case for the additional reason that the challenged columns are not " 'reasonably understood by the recipient of the communication to have been intended in the defamatory sense." ' White, 909 F.2d at 519 (quoting 2 F. Harper & F. James, The Law of Torts § 5.4, at 48 (1986)); see Restatement (Second) of Torts § 563 (1977) (defining the meaning of a publication as that which an audience would reasonably think was intended by the publisher).

Plaintiff recognizes that he must establish this intent, and accordingly alleges that the columns were written "in such a way as to impute guilt for the anthrax letters to Dr. Hatfill in the minds of reasonable readers." Because the columns specifically and repeatedly disavow any conclusion of guilt, no such intent can possibly be found, and the claim of libel fails as a matter of law for this reason as well. White, 909 F.2d at 526 (finding no claim for libel even where defendant "reported true facts from which a reader might infer that [plaintiff] used drugs," because the court could not find that "it would be reasonable for a reader to conclude that [defendant] intended the defamatory inference"); Thomas v. Los Angeles Times Communications, 189 F. Supp. 2d 1005, 1013 (C.D. Cal. 2002) (finding no claim for libel even where a reasonable reader might conclude that plaintiff had lied about his past, because "no reasonable juror could find that Defendants intended to convey that impression"), aff'd, 45 Fed. Appx. 801 (9th Cir. 2002). The columns are not

reasonably capable of being understood to convey either an accusation that plaintiff is the anthrax mailer, or an intention by the author to make such an accusation.

In Count II of his Complaint, plaintiff attempts to state a separate and independent claim of libel based upon a number of discrete untruths he purports to find in Kristof's columns. This cause of action likewise fails as a matter of law for two independent reasons. First, this additional claim of other libels was not asserted in the initial state court action, and is therefore time-barred. Second, none of the allegedly false facts is independently capable of a defamatory meaning in any event.

Hatfill's cause of action for libel are governed by Virginia's one-year statute of limitations. Va. Code Ann. § 8.01-247.1 (2000). Because the columns at issue were published between May and August 2002, the claims for libel in this action filed on July 13, 2004, standing alone, indisputable are time-barred. See Jordan v. Shands, 500 S.E.2d 215, 218 (Va. 1998) (determining that a claim for defamation accrues on the date that the defamatory publication occurred). The only way plaintiff can proceed at all on any claim for libel based on the 2002 columns is by virtue of his earlier, unprosecuted state court action and the provisions of Virginia's tolling statute. Section 8.01-229 (E) (3) of the Virginia Code affords to a plaintiff who voluntarily withdraws a state court action and recommences it in federal court within six months the benefit of a tolling of the statute of limitations as of the date the original state court lawsuit was commenced. Plaintiff's state action was filed on June 18, 2003 and voluntarily dismissed on March 9, 2004, before service of process was ever attempted. Because this federal action was commenced within six months of March 9, the tolling provisions of section 8.01-229 (E) (3) saves the libel claim asserted in the state court Motion for Judgment.

The only defamation claim asserted by Hatfill in his state court action, however, was a single cause of action alleging that "[d]efendants' false and reckless public identification of Dr. Hatfill as the likely anthrax mailed imputed homicidal activity to Dr. Hatfill and impugned his good name." Because the state court Motion for Judgment asserted only the libel by implication claim asserted in Count I here, the separate libel claim for the alleged discrete untruths is time-barred and cannot retroactively be revived. See, e.g., Spencer v. Sharp Elecs. Corp., No. 153395, 1997 WL 1070541 at *1-2 (Va. Cir. Ct. Mar. 12, 1997) (holding that the commencement of a defamation action does not toll the statute of limitations as to a wrongful discharge claim where the motion for judgment alleges facts that would support both actions but seeks redress for defamation only and does not request relief for wrongful discharge) (citing Vines v. Branch, 418 S.E.2d 890, 893 (Va. 1992)).

As a matter of Virginia law, a party must plead precisely the actual words alleged to be defamatory in order to state a claim for libel. "Good pleading requires that the exact words spoken or written must be set out in the declaration in haec verba." Fed. Land Bank of Baltimore v. Birchfield, 3 S.E.2d 405, 410 (Va. 1939). Thus, in order to preserve any separate defamation claim for discrete untruths, plaintiff must have alleged the defamatory words with particularity in his state court action, but did not do so.[3] Plaintiff did not save his claim by attaching four of the columns to the state complaint and incorporate them by reference. Virginia's in haec verba

[3] The only statement separately alleged to be untrue in his earlier state court pleading is that plaintiff "was once caught with a girlfriend in a biohazard 'hot suite' at Ft. Detrick surrounded only by blushing germs." Rappaport Decl. Ex. B ¶ 13. Yet, plaintiff did not attempt in his state court Motion for Judgement to premise a cause of action for libel on this statement separate and apart from the alleged implication that plaintiff is the anthrax mailer.

requirement explicitly requires otherwise. Fuste v. Riverside Healthcare Ass'n, 575 S.E.2d 858, 862 (Va. 2003). Consequently, Count II of the present Complaint is time barred in its entirety.

Beyond being stale, no claim for libel arises from the alleged discrete untruths because none is independently defamatory. A claim for defamation requires that a statement not only be false, it must also be defamatory; "it must 'tend[ ] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' " Chapin, 993 F.2d at 1092 (quoting Restatement (Second) of Torts § 559). The "discrete" statements identified by Hatfill in his Complaint have no such independent defamatory impact. The statements in question are that plaintiff:

- was one of several scientists who had the "ability to access and motive to send the anthrax."
- had access to an "isolated residence" in the fall of 2001 and "gave Cipro ... to people who visited the [residence],"
- had anthrax vaccinations that were "up to date,"
- "failed 3 successive polygraph examinations,"
- was "upset with the United States Government for a period preceding the anthrax attack,"
- "was once caught with a girlfriend in a biohazard 'hot suite' at Fort Detrick ... surrounded only by blushing germs,"

As is readily apparent, none of these statements, standing alone, imparts any independent defamatory sting. It simply is not harmful to reputation to suggest, in isolation, that someone's anthrax vaccinations are up to date. The Complaint actually recognizes just this, alleging that the "discrete untruths" simply reinforce the purported implication that Hatfill is the anthrax mailer. As such, as a matter of law, they cannot support any independent claim for libel.

In Herbert v. Lando, 781 F.2d 298 (2nd Cir. 1986), the Second Circuit confronted a similar contention by a libel plaintiff. There, the plaintiff asserted that more than a dozen individual statements in a 60 Minutes report conveyed the twin defamatory implications that plaintiff had lied about reporting war crimes to his superiors and invented a story to explain why he had been relieved of his command. As here, plaintiff argued that liability could be premised separately upon individuals false statements in the broadcast and upon the overall implications he attributed to the broadcast. The Second Circuit disagreed:

> Examining each of the specific statements Hebert claims was made with actual malice, however, we do not find a distinction between the defamatory meaning a viewer would derive from the particular statements, and the supposedly larger defamatory "impact" Herbert insists is conveyed by the publication as a whole.

Id. at 307-08. Because the contested statements were "merely a subsidiary matter to the primary, non-actionable issue--whether [plaintiff] lied about reporting war crimes," the subsidiary statements were not actionable either. Id. at 311-12.

Because the defamatory gist of the "discrete untruths" is, by plaintiff's own allegation, the implication that he committed "acts of murder and terrorism" by mailing the anthrax letters in 2001, they do not support a claim for libel independent from Count I of his Complaint, in which he alleges precisely the same defamatory "sting," and which is not actionable for the reasons set forth in See Herbert, 781 F.2d at 312 ("[t]o base his defamation action on subsidiary statements whose ultimate defamatory implications are themselves not actionable, we believe, would be a classic case of the tail wagging the dog"); see also Church of Scientology Int'l v. Behar, 238 F.3d 168, 176 (2nd Cir. 2001) (affirming dismissal because "the district court properly held that the [challenged statement] was subsidiary in meaning to the larger [non-actionable] thrust of the Article"); Tavoulareas v. Piro, 817 F.2d 762, 788 (D.C. Cir. 1987).

Plaintiff does try to carve out for one of the "discrete untruths" a purportedly independent defamatory meaning. Hatfill alleges that the reference to being found in a "biohazard suite" with a girlfriend independently means that he was "unprofessional, irresponsible, a security risk, and of such character as to engage in dangerous, unlawful and outrageous behavior." While this purported meaning is not truly distinct from the "larger [non-actionable] thrust" of the columns, for all of the reasons set forth above, this purported implication of unprofessional conduct is (1) not reasonably conveyed by the columns, and (2) not reasonably understood to have been intended by defendants.

Count III of the Complaint purports to state a cause of action for intentional infliction of emotional distress. In Virginia, this tort is " 'not favored' in the law." Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989) (citation omitted); see also Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 269 (4th Cir. 2001) (same). Virginia requires that a

plaintiff both plead, and prove by clear and convincing evidence, that: (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable; (3) there was a causal relationship between the conduct and the emotional distress; and (4) the emotional distress was severe. Russo v. White, 400 S.E.2d 160, 162 (Va. 1991); Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974). A plaintiff also "must allege all facts necessary to establish a cause of action ... with the requisite degree of specificity." Jordan v. Shands, 500 S.E.2d 215, 219 (Va. 1998).

The plaintiff must allege that "'the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Russo, 400 S.E.2d at 162 (citation omitted); see also Baird v. Rose, 192 F.3d 462, 472 (4th Cir. 1999). Publishing news or commentary on matters of public concern simply cannot be deemed conduct so "outrageous and intolerable" as to support a claim for intentional infliction of emotional distress. For example, in Warner v. Buck Creek Nursery, Inc., 149 F. Supp. 2d 246, 250 (W.D. Va. 2001), a fired employee brought a group of claims, including claims for defamation and intentional infliction of emotional distress, against his former employer. He alleged that his former employer's conduct was outrageous because the employer had falsely stated that plaintiff was fired for theft. Id. at 252. The court reasoned that, while plaintiff's allegations, if true, "might support his defamation claim," they were "completely insufficient to demonstrate the level of outrageous required under Virginia law." Id. at 265 & n. 9.[4]

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[4] See also, e.g., Van Buskirk v. New York Times Co., 28 Media L. Rep (BNA) 2525, 2528 (S.D.N.Y. 2000) (writing article in an effort to disprove statements by plaintiff suggesting that defendant had committed

Hatfill is also required to allege and prove "extreme" emotional distress, and "only where the distress inflicted is so severe that no reasonable person could be expected to endure it" may there be liability. Dixon v. Denny's, Inc., 957 F. Supp. 792, 796 (E. D. Va. 1996) (quoting Russo, 400 S.E.2d at 163). This heightened showing is required because, "[i]f everyone was allowed damages for injuries to his feelings cause by someone else, the chief business of mankind might be fighting each other in the courts." Barrett, 240 F.3d at 269 (quoting Bowles v. May, 166 S.E. 550, 555 (Va. 1932)); Ruth, 377 S.E.2d at 415. For these reasons, this element of the tort "is difficult to satisfy." Michael v. Sentara Health Sys., 939 F. Supp. 1220, 1233 (E.D. Va. 1996). Whether the facts alleged will support a finding of severe emotional distress is for the trial court to determine initially. Russo, 400 S.E. 2d at 162.

Hatfill has failed to plead emotional distress sufficiently severe to satisfy this standard. Indeed, the only allegations bearing on this element of his claim are the conclusory assertions that he suffered "grievous" and "severe" emotional distress.

Finally, the claim for intentional infliction of emotional distress must be dismissed because it constitutes an impermissible effort to evade the constitutional limits on

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war crimes "cannot reasonably be described as outrageous behavior"), aff'd, 325 F.3d 87 (2nd Cir. 2003); Mayes v. LIN Television of Texas, Inc., 27 Media L. Rep. (BNA) 1214, 1219, (N.D. Tex. 1998) ("publication of truthful, albeit embarrassing, information has again and again been determined not to constitute extreme and outrageous conduct"); Dougherty v. Captial Cities Communication, Inc., 631 F. Supp. 1566, 1576 (E.D. Mich. 1986) ("reporting on important matters of legitimate public interest ... without actual malice ... cannot be ... so extreme and outrageous as to shock the public conscience, as is required for intentional infliction of emotional distress.")

damage claims arising solely out of an act of publication. In Smith v. Dameron, 12 Va. Cir. 105 (Va. Cir. Ct. 1987), for example, the court dismissed an intentional infliction of emotional distress claim based on a newspaper report of a teacher's allegation that the parents of a student who had committed suicide had not done enough "to assist him in coping with teenage problems." While publication of an allegedly false fact "may form the basis of an action for defamation," the court held, "a separate action for infliction of emotional distress which is premised solely on allegedly slanderous or libelous words themselves[ ] is not only superfluous but impermissibly duplicative." Id.; see Foretich v. Advance Magazine Publishers, Inc., 765 F. Supp. 1099, 1104 (D.D.C. 1991) (mentioning that courts should not permit plaintiffs, through creative pleading, to invoke other torts as a means of "end-running other requirements of defamation law").

As in Dameron, Hatfill's intentional infliction of emotional distress claim here is expressly and solely based on the defendant's publication of the series of columns in question. And Hatfill does not contend that he seeks recovery for any different injury under Count III of the Complaint than under his causes of action for defamation.

The Complaint should be dismissed as to Kristof for the further reason that the Court lacks personal jurisdiction over him. A federal court may exercise personal jurisdiction over a defendant only insofar as authorized by state law, as limited by the constitutional requirements of due process. See, e.g., Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 396097 (4th Cir. 2003); Young v. New Haven Advocate, 315 F.3d 256, 261 (4th Cir. 2002); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 622 (4th Cir. 1997). The plaintiff bears the burden of proving that personal jurisdiction

exists over an out-of-state defendant. Young, 315 F.3d at 261.

The only prong of Virginia's long-arm statute potentially relevant in the present circumstances authorizes a court to exercise personal jurisdiction over a person

> as to cause of action arising from the person's ... [c]ausing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth.

Va. Code Ann § 8.01-328.1(A). In this regard, it is well established that writing for a nationally circulated newspaper does not constitute doing or soliciting business, or engaging in a persistent course of conduct within a forum state. E.g., McFarlane v. Esquire Magazine, 74 F.3d 1296, 1301 (D.C. Cir. 1996) ("writing an article for a publication that is circulated throughout the nation ... hardly constitutes doing or soliciting business, or engaging in a persistent course of conduct within [that jurisdiction]"). Nor does the fact that a court has personal jurisdiction over a publisher, here The Times, create jurisdiction over its reporter. Rather, a reporter's contacts must be assessed separately from the publisher's contacts. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984); Bochan v. La Fontaine, 68 F. Supp. 2d 692, 699 n.25 (E.D. Va. 1999).

Nicholas Kristof has no such persistent or on-going connections with Virginia: Kristof does not own real estate or hold tangible or intangible personal property situated in

Virginia, he resides and maintains his office in New York, and he does not do business in Virginia. Indeed, Kristof's sole contact with Virginia during the entire time he was working on the matter challenged columns was one-day business trip in early 2002 on an entirely unrelated matter, during which he flew into National Airport, conducted an interview in Northern Virginia (having nothing to do with Mr. Hatfill or anthrax) and returned to New York via National Airport the next day, after spending the night in the District of Columbia. Because this one contact had nothing to do with the columns at issue int his lawsuit, it cannot support the exercise of personal jurisdiction under Virginia's long-arm statute. Va. Code Ann. § 8.01-328.1(A) (authorizing jurisdiction only where cause of action arises from defendant's contact with Virginia); see also Bochan, 68 F. Supp. 2d at 696-97, 699 n.25 (limited contacts unrelated to cause of action, such as transit through National Airport, insufficient to support personal jurisdiction under long-arm statute).

Kristof had no contact with Virginia in researching or writing the columns that are at issue in this litigation. He did not travel to Virginia in connection with these columns, and, he did not otherwise engage in news gathering in Virginia.

Consequently, it would be a violation of due process as well as Virginia's long-arm statute for the Court to exercise personal jurisdiction over Kristof in this action. Compare Young, 315 F.3d at 263-64 (concluding that plaintiff failed to establish sufficient minimum contacts with Virginia because evidence showed Connecticut reporters' authorship of allegedly libelous articles posted by publisher on Internet site was not undertaken with manifest intent of targeting readers in Virginia), ESAB Group, 126 F.3d at 626 ("Although the place that the plaintiff feels the alleged injury is plainly relevant to the inquiry, it must ultimately be accompanied by

the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld."), and Barry v. Whalen, 796 F. Supp. 885, 890 (E.D. Va. 1992) (determining that defendants' contact was insufficient to satisfy requirements of due process despite the fact that defamation defendants had engaged in interviews about Virginia plaintiff), with Calder v. Jones, 465 U.S. 783, 789-90 (1984) (upholding personal jurisdiction over two Florida-based reporters in a defamation action pending in California brought by actress resident in California where evidence showed reporters' "actions were expressly aimed at California," reporters knew actress would feel any injury "in the State in which she lives and works and in which the[ir newspaper] has its largest circulation").

For these reasons, the Complaint should be dismissed in its entirety for failing to state a claim upon which relief can be granted, and should be dismissed against Nicholas Kristof for lack of personal jurisdiction.

/s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
November 24, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

STEVEN J. HATFILL,	)
	)
Plaintiff,	)
v.	)
	)
THE NEW YORK TIMES COMPANY	)
AND	)
NICHOLAS KRISTOF,	)
	)
Defendants.	)
	)

Civil Action No. 1:04cv807

ORDER

This matter comes before the Court on the Defendants Nicholas Kristof and the New York Times motions to dismiss. For the reasons states in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Defendants' motions are GRANTED and this case is DISMISSED.

/s/ Claude M. Hilton
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
November 24, 2004

PUBLISHED

Filed: October 18, 2005

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2561

STEVEN J. HATFILL,

Plaintiff – Appellant,

versus

THE NEW YORK TIMES COMPANY,

Defendant – Appellee,

and

NICHOLAS KRISTOF,

Defendant.

ORDER

Appellee filed a petition for rehearing and/or rehearing en banc. Appellant filed a response to the petition.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Chief Judge Wilkins and Judges Widener, Luttig, Traxler, Shedd, and Duncan voted to deny the petition. Judges Wilkinson, Niemeyer, Michael, Motz, King, and Gregory voted to grant the petition. Judge Williams did not participate in this case.

The Court denies the petition.

Judge Wilkinson filed a dissenting opinion from the order denying rehearing en banc, in which Judge Michael and Judge King joined.

Entered at the direction of Judge Shedd for the Court.

For the Court – By Direction

/s/ Patricia S. Connor
Clerk

WILKINSON, Circuit Judge, dissenting from the denial of rehearing en banc:

The panel's decision in this case will restrict speech on a matter of vital public concern. The columns at issue urged government action on a question of grave national import and life-or-death consequence. It is unclear, to say the least, that Virginia law would ever find these columns to be defamatory, and the panel pushes state law in a direction that not only portends liability for valuable public commentary but aggravates, rather than alleviates, the constitutional tensions inherent in the defamation field.

It is worth remembering the context in which the columns at issue were published. In the aftermath of the September 11 attacks, the nation was alerted to the fact that someone was sending letters laced with anthrax through the mails. The letters were not simply directed at public officials but apparently at private individuals as well. Those who handled mail on a regular basis were concerned for their safety, and even ordinary residents were advised to take special precautions when opening their mail. At least five people died from anthrax exposure. There was, in addition, worry that law enforcement was ineffectual in locating the source of the anthrax production and distribution. In other words, both the problem and the steps necessary to resolve it were matters of public, indeed national, concern.

In the spring and summer of 2002, Nicholas Kristof, a columnist for the New York Times, published a series of pieces urging the federal government to step up its investigative and preventive efforts and take control of the situation. The columns appeared in the Times on five different dates: May 24, July 2, July 12, July 19, and August 13. They included descriptions first of a "Mr. Z," later identified in one column as Dr. Steven Hatfill, whom

circumstantial evidence suggested was a person of interest in the anthrax investigations. In plaintiff's view, these discussions contained serious factual errors and unfairly implicated him as the perpetrator. In defendant's view, the columns repeatedly disavowed any such conclusion and urged that the government conduct a thorough inquiry that would either inculpate plaintiff or exonerate him.

As a result of these events, this action for defamation and intentional infliction of emotional distress ensued. The district court dismissed it because, inter alia, it found that the columns were not actionable under state law. A divided panel of this court reversed. Hatfill v. New York Times, 416 F.3d 320 (2005). The majority found that the columns were fairly read as accusing plaintiff of the anthrax murders, and therefore held that defendant could face state tort liability for publishing them. Id. at 337. Judge Niemeyer dissented, "find[ing] nothing in the letter or spirit of the columns that amount[ed] to such an accusation." Id.

The panel's opinion appeared to downplay the importance of any First Amendment concerns in two important ways. First, it noted that the case was before the court on a motion to dismiss under Federal Rule 12(b)(6). E.g., id. at 334. Second, it characterized the case as wholly one of state law. E.g., id. at 330. I shall address in turn why these two rationales were not proper bases for reversing the district court. And I shall lastly take up what I regard as the deeply unfortunate free speech implications of the panel's ruling.

I.

The panel viewed its inquiry as limited to consideration of whether plaintiff had "adequately pled the elements of his claims under Virginia law." 416 F.3d at 324. This, I think, is much too simple. The procedural posture of this case--a

motion to dismiss for failure to state a claim under state law--should not obscure its constitutional importance.

A defamation case does not putter along as a state law case in its earliest stages, only to suddenly acquire First Amendment implications upon the tender of an affirmative defense. Defamation actions by their very nature seek to punish past speech and raise the specter of chilling future speech. For this reason, the Supreme Court has waged a lengthy "struggle to define the proper accommodation between the law of defamation and the freedoms of speech and press." Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 768 (1986) (internal quotation marks and alterations omitted). In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny, the Court infused the state common law of defamation with a constitutional dimension, creating not only procedural protections but also limiting "the type of speech which may be the subject of state defamation actions." Milkovich v. Lorain Journal Co., 497 U.S. 1, 16 (1990) (emphasis omitted).

The Constitution provides states some latitude to protect a citizen's good name and reputation, but that leeway is limited by the Founders' injunction that law shall not "abridg[e] the freedom of speech, or of the press." U.S. Const. amend. I. It makes little sense to acknowledge the special sensitivity of speech to defamation actions and then to say that speech interests matter little or not at all because of the procedural posture of the action. While a heightened pleading standard in defamation cases may be inappropriate, see, e.g., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514-15 (2002) (rejecting a heightened standard in employment discrimination cases), there is no reason why an action of this kind cannot frequently be resolved on a motion to dismiss. The most critical part of the record--the speech itself--is available prior to any discovery. Whether the statements are

defamatory as a matter of law will therefore be ripe for decision.

The panel majority in this case has read Virginia law aggressively to permit a wide array of defamation suits against news organizations. A court that reads state law so expansively when deciding a motion to dismiss creates a "threat ... of pecuniary liability" that "may impair the unfettered exercise of ... First Amendment freedoms." Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 12 (1970).

Even if liability is defeated down the road, the damage has been done. The defendant in this case may well possess the resources necessary for protracted litigation, but smaller dailies and weeklies in our circuit most assuredly do not. The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well. To allow litigation to impose large costs will dull democracy at the local level, because the monetary impacts of litigation for all but the largest media organizations will prove unacceptably high. Federal courts must maintain fidelity to state law, but here a federal court sitting in diversity has created constitutional problems by pushing state defamation law in new directions without unambiguous direction from the state courts or legislature. This has compounded the sort of constitutional tensions which the exercise of judicial restraint has long sought to avoid. See Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

II.

In allowing actions for defamation per se and intentional infliction of emotional distress to proceed, the panel's decision stretches the bounds of liability beyond where the state courts have placed them.

A.

The first two counts of plaintiff's complaint state claims for common law defamation. In the first, plaintiff alleges that Kristof's columns were defamatory because they amounted to "identification of [plaintiff] with the anthrax mailer." Compl. ¶ 42. In the second, he alleges that various individual statements contained within the columns are independently defamatory, because even in isolation they "would tend to incriminate [plaintiff]." Id. ¶ 43. The panel agreed with plaintiff's theory, finding that the columns and most of the statements "imputed to [plaintiff] the commission of a crime involving moral turpitude," 416 F.3d at 334, 335, and were therefore defamation per se under Virginia law, see Food Lion, Inc. v. Melton, 458 S.E.2d 580, 584 (Va. 1995).

That conclusion is both factually and legally incorrect. From a factual standpoint, even giving plaintiff the full benefit of Federal Rule 12(b)(6), the panel misinterprets the language of the statements and columns. The Supreme Court of Virginia instructs us that "[a] statement imputes the commission of a crime when it refers to matters that would naturally and presumably be understood by those [reading] them as charging a crime." Id. In other words, the statements and columns are not defamatory per se unless they can fairly be read to actually accuse plaintiff of being a criminal. I agree with both Judge Niemeyer and with the district court that the statements and columns at issue here make no such accusation.

The columns do present a list of circumstantial evidence against plaintiff, and plaintiff claims that several pieces of this evidence are false. But none of the supposedly false statements identified by plaintiff is sufficient to suggest that plaintiff is the anthrax murderer. See 416 F.3d at 338 (Niemeyer, J., dissenting) ("Reporting suspicion of criminal conduct - even elaborately and sometimes inaccurately - does not amount to an accusation of criminal conduct as necessary to support Dr. Hatfill's claim."). Stating that plaintiff had access to an isolated residence where visitors received anthrax vaccinations, or reporting that his own vaccinations were up to date, is a far cry from suggesting that he killed innocents by sending the anthrax virus through the mail. And where it is directly preceded by reminders that plaintiff should be presumed innocent and that "[t]here is not a shred of traditional physical evidence linking him to the attacks," the claim that he failed polygraph tests of an unspecified nature should not cause a reasonable reader to infer that he is in fact guilty. Finally, placing plaintiff among a "handful of individuals who had the ability, access and motive to send the anthrax" suggests only that he ought to be one of multiple suspects; it hardly points the finger at plaintiff alone.

Viewed as a whole, the columns do not pin guilt on plaintiff, but instead urge the investigation of an undeniable public threat. The columns involve pointed criticism of the Executive branch, primarily targeting the FBI for its purported "lackadaisical ineptitude in pursuing the anthrax killer." The first column opines that "[o]ne of the first steps we can take to reduce our vulnerability [to a biological attack] is to light a fire under the F.B.I. in its investigation," and the remaining columns seek to light that fire. They recount alleged facts suggesting why plaintiff is a suspect; they do so, however, not to cast him as the murderer, but to illustrate the unfortunate effects of government inaction not

only upon an anxious nation but also upon a man who finds himself at the center of a dawdling investigation.

The columns expressly avoid premature accusation by repeatedly reminding readers that the burden of the government's failure falls not only upon the public, who seek the safety of identifying the true culprit, but also upon plaintiff, who deserves an end to the "unseemly limbo" of being a suspect. Kristof makes plain his belief that "the presumption of innocence has already been maimed since 9/11 for foreign Muslims, and it should not be similarly cheapened with respect to [plaintiff]." Thus, "[i]t must be a genuine assumption that [plaintiff] is an innocent man caught in a nightmare," particularly considering the complete lack of physical evidence against him. The columns report further that plaintiff "denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot." While one reason to pursue the investigation vigorously is to arrest plaintiff if further evidence shows him to be the culprit, another major reason is to "exculpate him and remove [the] cloud of suspicion" if it does not. In view of their overall purpose and in light of their repeated disclaimers, these columns cannot "naturally and presumably be understood ... as charging a crime." Food Lion, 458 S.E.2d at 584.

From a legal standpoint, the panel majority extends liability for defamation per se beyond the two Virginia cases on which it relies. The statements that the Virginia Supreme Court found to be defamatory in Carwile v. Richmond Newspapers, Inc., 82 S.E.2d 588 (Va. 1954), and Schnupp v. Smith, 457 S.E.2d 42 (Va. 1995), were far more accusatory than those at issue here.

The defendant in Carwile published an article stating that public officials had the discretion to seek the plaintiff's

disbarment, necessarily implying that the plaintiff "could and should be subject to disbarment proceedings." 82 S.E.2d at 592; see also id. at 589-90. In contrast, the columns here did not suggest that the FBI "could and should" indict plaintiff. Indeed, the problem they identify is the lack of sufficient information with which to either charge or exonerate him.

The defamation in Schupp involved a description of the plaintiff committing the alleged criminal offense itself, stating that he acted as the driver for someone engaged in what could reasonably be inferred as a drug purchase. 457 S.E.2d at 45; see also id. at 46. The columns here, however, do not describe plaintiff taking direct actions--e.g., placing mysterious powder into envelopes--that might reasonably be inferred as criminal in and of themselves. In fact, their central thrust is the government's failure to uncover any such evidence.

Moreover, in neither Carwile nor Schupp was the allegedly defamatory language tempered by express disclaimers of prejudgment like those that pervade the columns at issue in this case. Taken together, these differences suggest that the columns here fall outside the previously defined scope of defamation per se in Virginia. At a minimum, these precedents do not provide the type of unambiguous support necessary to impose liability under constitutionally tense circumstances.

B.

The third count of plaintiff's complaint states a cause of action for intentional infliction of emotional distress. He alleges that the "intentional public identification of [plaintiff] with the anthrax murders ... was unconscionable, malicious, intentional, and calculated to inflict grievous emotional distress." Compl. ¶ 44.

In permitting this claim to proceed, the panel again commits errors of both fact and law. The panel errs factually when it concludes that "[a]ccepting [plaintiff's] allegations as true, [defendant] intentionally published false charges accusing him of being responsible for anthrax mailings that resulted in five deaths." 416 F.3d at 336. As the above analysis of the columns demonstrates, defendant did no such thing. The columns neither "accuse" plaintiff of being the anthrax killer nor level "charges" of murder against him.

The panel errs legally when it concludes that defendant's actions meet the narrow conditions under which an action for intentional infliction of emotional distress may lie. That tort is "not favored" in Virginia law. See Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989) (internal quotation marks omitted). It applies only in the most extreme of circumstances: where a defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Russo v. White, 400 S.E.2d 160, 162 (Va. 1991) (internal quotation marks omitted).

I am quite at a loss to see how publication of these columns "go[es] beyond all possible bounds of decency." They report on a matter of unquestioned public interest with urgent national security implications. The First Amendment expressly specifies that the "civilized community" in which we live is one that encourages public commentary of this type. Even assuming the columns contain the asserted factual errors, their publication is neither "intolerable" nor "atrocious." The panel offers no decision from Virginia or any other state that holds a news report on a subject of unquestioned public interest to be an intentional infliction of emotional distress. Its action is unprecedented.

III.

The consequences of this decision for the First Amendment run deep. If one purpose of public commentary is to assess the functioning of government, these columns were surely in that vein. In fact, the anthrax mailings and the government's response to them lie at the heart of legitimate public inquiry. It is true that Kristof's columns conveyed an unmistakable sense of urgency, but it is often the job of a commentator to prod officials to take action. It is also true that Kristof repeated his calls for an investigation, but multiple iterations are sometimes necessary to get the attention of anyone in charge.

Surely it is open to a columnist to comment – and comment vigorously – on whether law enforcement is properly carrying out those responsibilities with which it is charged. Bureaucracies have been known to be both sluggish and inept, and it is not only the prerogative, but the duty, of news organizations to insist that those agencies get off the dime. The costs of inaction can be, as here, to leave someone in the prolonged limbo of suspicion and to jeopardize public safety by leaving the wrongdoer – whomever he may be –at large.

The perils of inaction and of overzealous action on the part of law enforcement are alike proper subjects for a free press. In fact, if there is any area that merits public scrutiny, it would seem to be the workings of our criminal justice system. Both in its investigative and judicial aspects, that system is capable of serious malfunction.

Our criminal justice system does not suddenly reveal itself the day a verdict is announced. Rather, it undergoes public scrutiny as it unfolds. It is often difficult, if not impossible, to cover the long continuum of justice in John

Doe fashion without the use of a suspect's identity or name, as daily media reports on criminal activity make clear. It is the obligation of news media not to fasten guilt upon those who have not been tried, but it is equally their obligation not to deprive the public of a meaningful report. These columns were hard-hitting, to be sure, but they did not forsake the essential balance that our law requires.

In short, I believe that defendant was simply doing its job. It is a job that the Constitution protects, and I would not construe gray areas of Virginia law to punish it and deter others from performing it. It is tempting, I recognize, to view the press's assertions of its freedoms as something of a self-interested wail. But before succumbing too fully to this impulse, we might ask who else will do the job of calling bureaucratic judgments to account. The public's right to know in this case was not a matter of voyeurism, titillation, or idle curiosity. The bioterrorism presaged by these anthrax mailings was no small matter, and it may one day pose a threat on a very large scale. Let us hope that on that day, reluctance to take issue with authority has not become our norm. "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." Sullivan, 376 U.S. at 278.

Judge Michael and Judge King join me in this dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

STEVEN J. HATFILL,)
)
Plaintiff,)
)
v.)
)
THE NEW YORK TIMES COMPANY)
)
Serve: Secretary of the Commonwealth)
830 East Main Street, 14th Floor)
Richmond, Virginia 23219)
and)
)
NICHOLAS KRISTOF)
)
Serve: Secretary of the Commonwealth)
830 East Main Street, 14th Floor)
Richmond, Virginia 23219)
)
Defendants.)
C.A. #04-cv-807-A

COMPLAINT

Preliminary and Jurisdictional Statement

1. This is a lawsuit for defamation over which this court has jurisdiction under 28 U.S.C. §1332, the parties being of diverse citizenship and the amount in controversy exceeding $75,000 exclusive of interest and costs.

Parties

2. Plaintiff Steven J. Hatfill is a medical doctor and researcher in the field of bio-terrorism formerly employed in Fairfax, Virginia. He is a citizen and resident of the District of Columbia and also maintains living quarters in Virginia.

3. Defendant The New York Times Company ("the Times Company" or "the company") is a media enterprise which, among other things, publishes *The New York Times* ("*The Times*"), a daily newspaper. Its principal place of business is New York City. It actively solicits readers and subscribers in the state of Virginia, delivers *The Times* to many homes and businesses in Virginia, sells *The Times* in numerous commercial outlets in Virginia, and generally avails itself of the business opportunities available to it in Virginia.

4. Defendant Nicholas Kristof is a journalist whose work appears regularly in *The New York Times*. On information and belief, he is an employee of the Times Company. In regard to the matters here at issue, defendant Kristof acted at all times as the company's authorized agent, whose actions here at issue were approved in advance and ratified after the fact by the company. On information and belief he is a citizen of New York.

Claim for Relief

5. In the fall of 2001, anthrax-laced letters were sent through the United States mail to a variety of private and public parties, including two United States senators. As a result of the mailing and distribution of these letters, at least five persons died, the nation's postal service was severely disrupted, massive dislocations occurred within the federal

government and throughout the country, and the population was terrorized.

6. Following the receipt of the anthrax letters, the federal government began an effort to identify the source of the anthrax and the identity of the person or persons who mailed it. This effort has been unsuccessful to date.

7. In the months following the anthrax attacks, defendant Kristof came to the view that the manner in which the government had been pursuing the anthrax case was grossly deficient. In his view, identifying the anthrax mailer was an urgent national security issue. He believed that it was imperative to prevent the perpetrator from escaping to some rogue state and helping its bio-terror program. Mindful of his status as a prize-winning and well established columnist in what is generally viewed as the country's most influential newspaper, he saw himself as particularly well suited to get the federal government to act in a responsible, rather than in what he viewed as a bumbling and plodding, manner.

8. To this end, beginning in May 2002, defendant Kristof undertook to bring an alleged culprit to the public eye in the pages of *The Times*. For defendant Kristof, this public identification of a designated suspect was to serve as a means to expedite the identification of the anthrax mailer, be it his designee or someone else. It was inconsequential to defendant Kristof whether it turned out that his designated culprit was guilty or innocent, how reckless his allegations and insinuations were, or how injurious they were to his victim. What was at issue, in defendant Kristof's view, was to help "light a fire" under the federal investigators so that they might prosecute their investigation more aggressively.

9. For his designated culprit, defendant Kristof selected and individual whose presumed political views and alleged

past activities in white-ruled southern Africa, a decade and more before, were, as defendant Kristof well knew, markedly disfavored in contemporary American culture, and towards which he was personally hostile. Defendant Kristof correctly believed that it would be easier to garner support for his attack on his designated suspect if the latter were described in terms which would render him unappealing to most readers.

10. Specifically, on May 24, 2002, defendant Kristof published a column in *The Times* effectively accusing a then-unidentified person, in the mind of a reasonable reader, of having sent the anthrax letters. While defendant Kristof later confirmed that Dr. Hatfill was the subject of his May 24 column, this fact was not apparent from his May 24 column alone. Dr. Hatfill suffered no injury from the publication of the May 24 article alone.

11. On July 2, 2002, defendant Kristof wrote another column addressing the same issue. In this column, he saw fit to give Dr. Hatfill the pseudonym "Mr. Z." In his July 2 column, defendant Kristof stated that his accusations in his May 24 column were in reference to "Mr. Z." Defendant Kristof's description of "Mr. Z" was sufficiently detailed – albeit with inaccuracies as noted below – as to render "Mr. Z" readily recognizable as Dr. Hatfill, to the point that Marilyn Thompson, assistant managing editor for investigations at *The Washington Post*, later observed that defendant Kristof's descriptions of "Mr. Z" "read like Hatfill's biography." In an August, 2002 column, Mr. Kristof openly and voluntarily admitted that his "Mr. Z" was Dr. Hatfill.

12. Defendant Kristof wrote his columns in such a way as to impute guilt for the anthrax letters to Dr. Hatfill in the minds of reasonable readers.

13. When writing his accusatory articles about Dr. Hatfill, aimed as they were at federal decision-makers, defendant Kristof knew and relied on the fact that *The Times* was heavily marketed and sold in northern Virginia (as well as Washington, D.C. and Maryland inside the Capital Beltway). Defendant Kristof sought to target public and private figures, agencies and organizations resident in northern Virginia and centrally involved in the ongoing counter-terrorism campaign, including, without limitation: the Central Intelligence Agency, which agency had jurisdiction over foreign intelligence, including investigation of the "rogue states" and their bio-terror programs expressly warned against by defendant Kristof; many United States senators including one to whom an anthrax letter had been mailed, representatives and other high level government officials; the Pentagon; and numerous private firms which supported the government in relation to national security and bio-terrorism work, including specifically Science Applications International Corporation ("SAIC") located in Fairfax, where Dr. Hatfill had been working on biological counter-terrorism before being terminated in 2002 following the anthrax attacks. Targeting such Virginia readers within this spectrum of persons of knowledge, power and influence regarding issues of bio-terrorism was central to defendant Kristof's effort to "light a fire" under the government.

14. Copies of defendant Kristof's defamatory columns regarding Dr. Hatfill are attached hereto as Exhibit A, and their contents incorporated herein by reference. The articles as a whole, and in various specific statements describing Dr. Hatfill's background and work in the field of bio-terrorism, state or imply that Dr. Hatfill was the anthrax mailer. Those articles are written in such a way that they would induce a reasonable reader to deem Dr. Hatfill responsible for the anthrax mailings.

15. Defendant Kristof's transparent identification of Dr. Hatfill, under the name of "Mr. Z," as the likely anthrax mailer was baseless and false, and placed Dr. Hatfill in a woefully injurious false and defamatory light. Defendant Kristof identified Dr. Hatfill as the likely anthrax mailer and placed him in this false light in reckless disregard of whether his accusation to this effect was true, and merely in aid of his collateral purpose to "light a fire" under what he viewed as the government's desultory anthrax investigation, notwithstanding the devastating consequences of his actions for Dr. Hatfill.

16. In addition to identifying Dr. Hatfill wrongfully and baselessly with the anthrax mailings, defendant Kristof published numerous discrete false statements about him, defamatory on their face or in the context in which they appeared, in reckless disregard of whether what he wrote was true. Such statements include the following, among others:

a) the assertion that Dr. Hatfill "unquestionably had the ability to make first-rate anthrax."

b) the assertion that Dr. Hatfill had the "ability" to send the anthrax.

c) the assertion that Dr. Hatfill had the "access" required to send the anthrax.

d) the assertion that Dr. Hatfill had a "motive" to send the anthrax.

e) the assertion that Dr. Hatfill was one of a "handful" of individuals who had the "ability, access and motive to send the anthrax."

f) the assertion that Dr. Hatfill "had access" to an "isolated residence" in the fall of 2001, when the anthrax letters were sent.

g) the assertion that Dr. Hatfill "gave Cipro [an antibiotic famously used in the treatment of anthrax infection] to people who visited [the 'isolated residence']."

h) the assertion that Dr. Hatfill's anthrax vaccinations were "up to date" as of May 24, 2002.

i) the assertion that Dr. Hatfill "failed 3 successive polygraph examinations" between January 2002 and August 13, 2002.

j) the assertion that Dr. Hatfill "was upset at the United States government in the period preceding the anthrax attack."

k) the assertion that Dr. Hatfill "was once caught with a girlfriend in a biohazard 'hot suite' at Fort Detrick [where Dr. Hatfill had concededly worked] surrounded only by blushing germs."

17. With the exception of the last assertion, each of the foregoing statements, which were independently false and defamatory, was intended, and interpreted by reasonable readers, to provide support for the false and defamatory assertion and implication that Dr. Hatfill was guilty of committing acts of murder and terrorism by means of the anthrax letters. The final false and defamatory assertion ("k") was intended, and interpreted by reasonable readers, to convey the impression that Dr. Hatfill was unprofessional,

irresponsible, a security risk, and of such character as to engage in dangerous, unlawful and outrageous misbehavior. The misstatements meaningfully shaped and altered reasonable readers' estimations of the likelihood of Dr. Hatfill's guilt in the matter. They were made by defendant Kristof in reckless disregard of the truth or falsity of both the statements themselves and the truth or falsity of the resulting conclusory assertion or implication of Dr. Hatfill's guilt.

18. At no time prior to the writing of his defamatory columns did defendant Kristof contact of seek input from Dr. Hatfill, whose whereabouts were at all times readily available to him. Even after Dr. Hatfill appeared on national television denouncing the defamation which had victimized him, defendant Kristof did not contact him before once again writing falsehoods about him, set forth in Exhibit A. Nor did defendant Kristof contact Dr. Hatfill's counsel, whose name and address became matters of public record at Dr. Hatfill's first news conference. Nor did defendant Kristof contact Dr. Hatfill's press spokesman, who repeatedly appeared on national television criticizing the character assassination of Dr. Hatfill.

19. Defendant Kristof's repeated failures to seek or obtain input from Dr. Hatfill were magnified by the fact that defendant Kristof was not writing about suddenly breaking news on deadline, but writing at his leisure over a period of weeks. His not soliciting available input from or on behalf of the available subject of his seriously accusatory pieces of journalism set forth in Exhibit A constituted palpably substandard and unethical journalism, in which defendant Kristof engaged in reckless disregard of his obligations as a journalist and of Dr. Hatfill's rights.

20. On information and belief, when writing about persons defendant Kristof uses their actual names rather than

pseudonyms unless there is sufficient cause to use a pseudonym. In this case, he used a pseudonym for Dr. Hatfill because he knew that what he was writing was written in reckless disregard of the truth, and imagined, or was counseled, that using the pseudonym might help shield him from liability for defamation.

21. On information and belief *The Times* has a policy of using person's actual names when publishing pieces about them, rather than using pseudonyms, unless there is good cause to use a pseudonym. In this case there was no such cause other than the fact that defendant Kristof's columns were transparently defamatory towards Dr. Hatfill, and *The Times* imagined, or was counseled, that using the pseudonym might help shield it from liability for defamation. *The Times* knew or should have known that defendant Kristof's columns were in fact defamatory towards Dr. Hatfill.

22. At no relevant time has *The Times* held its columnists to a lower standard than its news reporters relative to not publishing defamatory material in the newspaper.

23. On information and belief, on the issue of truthfulness and defamation defendant Kristof does not hold himself to a lower standard as a columnist than he sets for himself or others as a journalist writing news stories rather than columns.

24. Defendant Kristof's columns were published by *The Times* without the newspaper's taking appropriate steps to satisfy itself regarding the accuracy or fairness of defendant Kristof's libeling of Dr. Hatfill. *The Times* simply gave defendant Kristof free rein to defame Dr. Hatfill as he saw fit in its pages, without requiring him to justify his damning insinuations and accusations internally or in print, and in reckless disregard of whether his accusations and

insinuations were true or reasonably supported by evidence. On information and belief, individual journalists at *The Times* remonstrated vigorously, albeit to no avail, with defendant Kristof, but the company let him do as he pleased.

25. On information and belief, *The Times'* editorial and management staff exercised lackadaisical control over the publication of erroneous information in the newspaper's pages until at least mid-2003, when numerous articles published in *The Times* were exposed as sheer fabrications. At this time the paper fired or caused the resignations of numerous writers and editors and instituted new procedures, including the designation of a "public editor" or ombudsman, intended to enhance the integrity of what appeared in its pages.

26. More recently, *The Times*, through its editorial staff and its public editor, has acknowledged that the newspaper's coverage of related biological warfare issues was "not as rigorous as it should have been," including the publication of information that was "insufficiently qualified or allowed to stand unchallenged." *The Times'* editors have publicly conceded that "Editors at several levels who should have been challenging reporters and pressing for more skepticism were perhaps too intent on rushing scoops into the paper." The newspaper's public editor has found "institutional failures" leading to credulous and inaccurate reporting, including: "the hunger for scoops," "hit and run journalism," "coddling sources" and inadequate, "end-run" editing. All these problems characterized *The Times'* review and control of defendant Kristof's defamatory pieces regarding Dr. Hatfill.

27. Defendants published the false and defamatory material regarding Dr. Hatfill in reckless disregard of its truth or falsity.

28. At the time of the publication of defendant Kristof's "Mr. Z" articles, *The Times* considered itself the nation's newspaper of record, and was generally recognized as the most prominent and influential daily newspaper in the country.

29. The publication of defendant Kristof's repeated defamation of Dr. Hatfill by *The Times* gave rise to severe notoriety gravely injurious to Dr. Hatfill. The injury to Dr. Hatfill's reputation was all the more severe given the status and journalistic clout of *The Times*.

30. By reason of the presumptively authoritative nature of information published in *The Times*, defamation of Dr. Hatfill paralleling that of defendants' was thereafter repeatedly published by a host of print and on-line publications and on the television and radio news. This republication, duly and reasonably anticipated by defendants given the conceded prominence of *The Times*, continued for a period of months.

31. On August 13, 2002, counsel for Dr. Hatfill sent a letter to the editor of *The Times*, intended for publication, in an effort to mitigate some of the harm that had befallen Dr. Hatfill as a result of defendants' actions. The letter is attached hereto as Exhibit B.

32. *The Times* rejected counsel's letter as "too long."

33. Counsel thereupon recast his letter as an op-ed article, and submitted it a second time to *The Times*.

34. *The Times* rejected the op-ed article on the alleged ground that "it is a response to a column and would therefore have to be considered a letter."

35. Counsel thereupon sent his August 13, 2002 letter to defendant Kristof, requesting that he publish it in his next column, followed by whatever he, Kristof, saw fit.

36. Defendant Kristof replied that "the place to publish a letter is either in the letters columns or on the op-ed page."

37. Neither counsel's letter, nor any portion thereof or reference thereto, was ever published in *The Times*. Rather, in an editorial dated August 14, 2002, *The Times*, studiously ignoring the damage it and its journalist had caused, purported to bemoan any process of "assuming [Dr. Hatfill] is guilty before he is charged," even as the editorial repeated defendant Kristof's insinuations and stated that "The public scrutiny [of Dr. Hatfill] is legitimate." In an article published on August 26, 2002, *The Times'* editorial page editor Gail Collins further responded to Dr. Hatfill's criticisms by stating: "We have confidence in our columnists."

38. Defendant Kristof knowingly and recklessly traded off Dr. Hatfill's good name in return for his, Kristof's, private aggrandizement as the one who allegedly "lit a fire" under the federal investigation into the anthrax mailings. This defamatory trade-off, accomplished in derogation of Kristof's elementary obligations of professionalism and fairness as a journalist, was malicious, willful and oppressive, to Dr. Hatfill's great detriment. Defendant Kristof's intentional, knowing and cynical public campaign of subordinating Dr. Hatfill's good name, reputation and well being to his, Kristof's, private vigilante agenda was calculated to inflict severe emotional distress upon Dr. Hatfill, which it did.

39. Defendant The New York Times Company knowingly and recklessly suffered defendant Kristof repeatedly to publish defamation of Dr. Hatfill in the pages

of *The Times* without regard to the truth or falsity of what defendant Kristof had written, following which it refused Dr. Hatfill's counsel an opportunity fairly to correct the record and editorially encouraged an ongoing journalistic feeding frenzy at Dr. Hatfill's expense by noting, that "The public scrutiny [of Dr. Hatfill] is legitimate." In fact, *The Times* knew but recklessly disregarded the fact that while discreet governmental scrutiny of all bio-weapons experts, including Dr. Hatfill, was appropriate, "public scrutiny," to say nothing of public innuendo or accusations such as defendant Kristof's against Dr. Hatfill were inimical to an orderly and effective governmental investigation of the anthrax letters.

40. As a result of defendants' defamation here at issue, Dr. Hatfill has suffered severe and ongoing loss of reputation and professional standing, loss of employment, past and ongoing financial injury, severe emotional distress and other injury.

41. On or about June 18, 2003, Dr. Hatfill filed suit stating the claims here at issue against these defendants in Fairfax County Circuit Court. That lawsuit was nonsuited by order dated March 9, 2004. The instant case is filed within all relevant statutory periods of limitation.

Causes of Action

Count I: Defamation: Defamation *per se*: Identification of Dr. Hatfill As Anthrax Mailer

42. Defendants' false and reckless public identification of Dr. Hatfill with the anthrax mailings, both directly and by implication from the manner in which his personal and professional background were presented in the "Mr. Z" columns, constituted a false factual allegation of terrorist and homicidal activity and impugned Dr. Hatfill's good name as

a citizen, a physician and a bio-medical researcher to a reasonable reader. This identification of Dr. Hatfill with the anthrax mailer constituted, separately, defamation and defamation *per se*.

Count II: Defamation: Defamation *Per Se*: Discrete Untruths

43. Each of defendants' discrete false and reckless allegations enumerated in ¶16 of this complaint, constituted defamation and defamation *per se*, that, in the mind of a reasonable reader, would tend to incriminate Dr. Hatfill in the anthrax mailings, to his enormous detriment.

Count III: Intentional Infliction of Emotional Distress

44. Defendant Kristof's intentional public identification of Dr. Hatfill with the anthrax murders regardless of whether Dr. Hatfill was guilty or innocent, and expressly for the collateral purpose of "lighting a fire" under the governmental investigation of the anthrax letters, was unconscionable, malicious, intentional, and calculated to inflict grievous emotional distress upon Dr. Hatfill, which it did. Defendant New York Times Company is liable for this tort and its consequences under the theories of *respondeat superior*, agency, or both.

Relief Requested

Wherefore, Dr. Hatfill requests judgment against defendants, jointly and severally, for his actual damages and for punitive damages in amounts appropriate to the proof at trial, for his costs, and for such other relief as is just.

Dr. Hatfill requests trial by jury.

Respectfully submitted,

STEVEN J. HATFILL,

By counsel

Dated: July 13, 2004

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Hatfill\Pleadings\Complaint

EXHIBIT A

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The New York Times

May 24, 2002 Friday
Late Edition - Final

SECTION: Section A; Column 5; Editorial Desk; Pg. 25

LENGTH: 720 words

HEADLINE: Connecting Deadly Dots

BYLINE: By NICHOLAS D. KRISTOF; E-mail: nicholas@nytimes.com

BODY:

Why didn't the Bush administration connect the dots and take aggressive measures before 9/11?

For the same reason we're not doing so today: distractions and a lack of urgency. Forget about the blame game -- for it's just that kind of distraction. It's more important to look ahead and try to block the next attack. Where are the dots today?

One dot is Osama bin Laden's fervent efforts to obtain bio-weapons, reflected in the lab he was building near Kandahar, Afghanistan, to produce anthrax.

Another dot is Iraq. Hazem Ali, a senior Iraqi virologist involved in his country's bio-weapons program, has admitted working with camelpox virus. It's a puzzling choice for a bio-weapon because it's a mild disease -- except, as Jonathan Tucker notes in his book "Scourge," Iraq may be genetically engineering camelpox into something closer to smallpox. A

scientist who once worked in the Soviet bio-weapons program told me of a visit by Iraqi scientists inquiring about genetic engineering of germs.

A third dot is our vulnerability. The Brentwood mail-sorting facility in Washington is still closed because of contamination, as is the Hamilton Township processing center in New Jersey. Just 100 anthrax letters, if mailed around the nation, could close down the U.S. postal system.

A fourth is our failure to capture the anthrax killer, suggesting to Iraq and other potential perpetrators that they might get away with an attack.

So connect these dots and what do they suggest? A biological threat that requires much more vigorous and urgent countermeasures.

Richard Danzig, a bioterror expert and former secretary of the Navy, noted that the anthrax attacks in the fall could be thought of as 5/11: 5 people died, and 11 were infected with inhalation anthrax. Today people worry more about 9/11 scenarios than about 5/11 attacks -- even though a bioterror attack could be incomparably more devastating.

"The more significant national security issue is 5/11," Mr. Danzig said. "The risk of recurrence is high, and could involve anything from a few casualties to tens of thousands. Accordingly, I think this is urgent."

The government once conducted an experiment using a Navy ship two miles off San Francisco to release harmless spores that had the same size and weight as anthrax. Experts tracked the spores and concluded that had this been anthrax, several hundred thousand people might have died -- although

no one would have been aware of the attack until the victims developed fevers four days later.

One of the first steps we can take to reduce our vulnerability is to light a fire under the F.B.I. in its investigation of the anthrax case. Experts in the bioterror field are already buzzing about a handful of individuals who had the ability, access and motive to send the anthrax.

These experts point, for example, to one middle-aged American who has worked for the United States military bio-defense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attack.

I say all this to prod the authorities, for although the F.B.I. has known about this handful of people since October, it has been painstakingly slow in its investigation. Let's hope it will pick up the pace, for solving the case would reduce our vulnerability to another attack.

At a policy level, how are we doing at reducing our vulnerability?

"I don't think anything significant has been done to reduce our vulnerability just yet, aside from creating greater awareness," said Barbara Hatch Rosenberg, a microbiologist who studies bioterrorism for the Federation of American Scientists.

So what should be done? Experts offer suggestions like these:

Smallpox vaccination should begin on a voluntary basis.

Air filtration should be upgraded in landmark buildings. Humidity should be kept above 20 percent so that particles will clump together and aerosol attacks are less effective.

Germ detectors developed by the military should be installed in Grand Central Terminal and elsewhere in New York City. These detectors don't work well, but they are being used at key locations in Washington -- though not in New York. The message seems to be: "Pentagon to City: Drop Dead."

URL: http://www.nytimes.com

LOAD-DATE: May 24, 2002

The New York Times **OP-ED** Tuesday, July 2, 2002

Nicholas D. Kristof

Anthrax?
The F.B.I. Yawns

The F.B.I.'s bumbling before 9/11 is water under the bridge. But the bureau's lackadaisical ineptitude in pursuing the anthrax killer continues to threaten America's national security by permitting him to strike again or, more likely, to flee to Iran or North Korea.

Almost everyone who has encountered the F.B.I. anthrax investigation is aghast at the bureau's lethargy. Some in the biodefense community think they know a likely culprit, whom I'll call Mr. Z. Although the bureau has polygraphed Mr. Z, searched his home twice and interviewed him four times, it has not placed him under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters.

This is part of a larger pattern. Astonishingly, the F.B.I. allowed the destruction of anthrax stocks at Iowa State University, losing what might have been valuable genetic clues. Then it waited until December to open the intact anthrax envelope it found. The F.B.I. didn't obtain anthrax strains from various labs for comparison until March, and the testing is still not complete. The bureau did not systematically polygraph scientists at two suspect labs, Fort Detrick, Md., and Dugway Proving Ground in Utah, until a month ago.

Perhaps it's a cheap shot for an armchair detective to whine about the caution of dedicated and exceptionally hard-working investigators. Yet months pass and the bureau

continues to act like, well, a bureaucracy, plodding along in slow motion. People in the biodefense field first gave Mr. Z's name to the bureau as a suspect in October, and I wrote about him elliptically in a column on May 24.

He denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot. Some of his polygraphs show evasion, I hear, although that may be because of his temperament.

If Mr. Z were an Arab national, he would have been imprisoned long ago. But he is a true-blue American with close ties to the U.S. Defense Department, the C.I.A. and the American biodefense program. On the other hand, he was once caught with a girlfriend in a biohazard "hot suite" at Fort Detrick, surrounded only by blushing germs.

With many experts buzzing about Mr. Z behind his back, it's time for the F.B.I. to make a move: either it should go after him more aggressively, sifting thoroughly through his past and picking up loose threads, or it should seek to exculpate him and remove this cloud of suspicion.

Whoever sent the anthrax probably had no intention of killing people; the letters warned recipients to take antibiotics. My guess is that the goal was to help America by raising preparedness against biological attacks in the future.

So it seems fair to ask the F.B.I. a few questions:

Do you know how many identities and passports Mr. Z has and are you monitoring his international travel? I have found at least one alias for him, and he has continued to travel abroad on government assignments, even to Central Asia.

Why was his top security clearance suspended in August, less than a month before the anthrax attacks began? This move left him infuriated. Are the C.I.A. and military intelligence agencies cooperating fully with the investigation?

Have you searched the isolated residence that he had access to last fall? The F.B.I. has known about this building, and knows that Mr. Z gave Cipro to people who visited it. This property and many others are legally registered in the name of a friend of Mr. Z, but may be safe houses operated by American intelligence.

Have you examined whether Mr. Z has connections to the biggest anthrax outbreak among humans ever recorded, the one that sickened more than 10,000 black farmers in Zimbabwe in 1978-80? There is evidence that the anthrax was released by the white Rhodesian Army fighting against black guerrillas, and Mr. Z has claimed that he participated in the white army's much-feared Selous Scouts. Could rogue elements of the American military have backed the Rhodesian Army in anthrax and cholera attacks against blacks? Mr. Z's resume also claims involvement in the former South African Defense Force; all else aside, who knew that the U.S. Defense Department would pick an American who had served in the armed forces of two white-racist regimes to work in the American biodefense program with some of the world's deadliest germs?

What now? When do you shift into high gear?

E-mail: nicholas@nytimes.com

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July 12, 2002, Friday, Late Edition -
Final

SECTION: Section A; Page 19, Column 6; Editorial Desk

LENGTH: 715 words

HEADLINE: The **Anthrax** Files

BYLINE: By NICHOLAS D. KRISTOF; E-mail: nicholas@nytimes.com

BODY:

When someone expert in bio-warfare mailed **anthrax** last fall, it may not have been the first time he had struck.

So while the F.B.I. has been unbelievably lethargic in its investigation so far, any year now it will re-examine the package that arrived on April 24, 1997, at the B'nai B'rith headquarters in Washington. The package contained a petri dish mislabeled "anthracks." The dish did not contain **anthrax**. But a Navy lab determined that it was bacillus cereus, a very close, non-toxic cousin of **anthrax** used by the Defense Department.

Anybody able to obtain bacillus cereus knew how to spell "**anthrax**." An echo of that deliberate misspelling came last fall when the **anthrax** letters suggested taking "penacilin."

The choice of B'nai B'rith probably was meant to suggest Arab terrorists, because the building had once been the target of an assault by Muslim gunmen. In the same way, F.B.I.

profilers are convinced that the real **anthrax** attacks last year were conducted by an American scientist trying to pin the blame on Arabs.

In a column on July 2 I wrote about "Mr. Z," an American bio-defense insider who intrigues investigators and whose career has been spent in the shadowy world of counterterror and intelligence. He denies any involvement in the **anthrax** attacks.

On the date that the perpetrator chose for the B'nai B'rith attack, a terrorism seminar was under way in the Washington area and Mr. Z seemed peeved that neither he nor any other bio-defense expert had been included as a speaker. The next day, Mr. Z sent a letter to the organizer saying that he was "rather concerned" at the omission and added: "As was evidenced in downtown Washington D.C. a few hours later, this topic is vital to the security of the United States. I am tremendously interested in becoming more involved in this area. . . ."

Over the next couple of years, Mr. Z used the B'nai B'rith attack to underscore the importance of his field and his own status within it. "Remember B'nai B'rith," he noted at one point. In examples he gave of how **anthrax** attacks might happen, he had a penchant for dropping Arab names.

The F.B.I. must be on top of the B'nai B'rith episode, right? Well, it was told about it months ago. But B'nai B'rith says it hasn't been asked about the incident by the F.B.I.

The authorities seem equally oblivious to another round of intriguing **anthrax** hoaxes in February 1999. As with last fall's **anthrax** letters, a handful of envelopes with almost identical messages were sent to a combination of media and government targets including The Washington Post, NBC's

Atlanta office, a post office in Columbus, Ga. (next to Fort Benning, an Army base), and the Old Executive Office Building in Washington (where Mr. Z had given a briefing three months earlier).

I found a local policeman in Columbus willing to dig out his file on that 1999 **anthrax** hoax. There are several similarities with last fall's mailing. For example, one page of the 1999 letter says, in big, bold capitals: "WARNING: THIS BUILDING AND EVERYTHING IN IT HAS BEEN EXPOSED TO **ANTHRAX**. CALL 911 NOW AND SECURE THE BUILDING. OTHERWISE THE GERM WILL SPREAD."

Last fall's letters are also in bold capitals and use similar language patterns.

In contrast to the 1997 package with fake **anthrax** gelatin, the 1999 letters each contained a teaspoon of fake **anthrax** powder (roughly the same amount as of real **anthrax** in 2001). That's interesting because as of 1997, U.S. bio-defense scientists were working basically only with wet **anthrax**, while by 1999 some had experimented with making powders.

For example, Mr. Z apparently learned about powders during those two years. His 1999 resume adds something missing from the 1997 version: "working knowledge of wet and dry BW biological warfare agents, large-scale production of bacterial, rickettsial and viral BW pathogens and toxins."

Two outside consultants used by the F.B.I. to examine documents in the **anthrax** case, Don Foster and Mark Smith, both say they have not been shown the 1997 or 1999 hoax letters. The 1999 envelopes carried stamps, which may have been licked.

It would be fascinating to know whose DNA that is. Perhaps when the F.B.I. is finished defending itself from charges of lethargy, it will check.

LOAD-DATE: July 12, 2002

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July 19, 2002, Friday,
Late Edition – Final

SECTION: Section A; Page 17, Column 6; Editorial Desk

LENGTH: 709 words

HEADLINE: Case of the Missing **Anthrax**

BYLINE: By NICHOLAS D. **KRISTOF**; Email: nicholas@nytimes.com

BODY:

It's bad enough that we can't find **anthrax** hidden in the Iraqi desert. But it turns out that we also misplaced **anthrax** and Ebola kept in a lab outside Washington D.C.

Internal Army documents about the U.S. biodefense program describe missing Ebola and other pathogens, vicious feuds, lax security, cover-ups and a "cowboy culture" beyond anyone's scrutiny. Moreover, germ warriors in the C.I.A. and the Defense Department decided -- without bothering to consult the White House -- to produce **anthrax** secretly and tinker with it in ways that arguably put the U.S. in violation of the Biological Weapons Convention. It's time for Congress or an outside commission to investigate our nation's biodefense program and establish oversight.

"Shenanigans have been going on," declares one internal Army memo about the labs at ground zero of the biodefense world: Usamriid, the acronym for the U.S. Army Medical Research Institute of Infectious Diseases, based at Fort Detrick, Md.

The 400 pages of documents, which I've obtained and which were described by The Hartford Courant earlier this year, quote a newly arrived officer named Michael Langford as saying in about 1992 that he found "little or no organization," "little or no accountability," "a very lax and unorganized system" and signs of covert work and cover-ups.

Mr. Langford requested an inventory of pathogens acquired in 1991. The resulting memo shows that 62 samples had vanished, including Ebola, hantavirus, **anthrax**, S.I.V. (the monkey version of the virus that causes AIDS), and several described only as "unknown."

Usamriid says that it rechecked this year and was able to account for virtually all of the missing specimens except one set that would have been irradiated to render it harmless. But a decade's delay in bothering to look for missing Ebola seems a bit much, and conversations with scientists who have worked at Usamriid do not inspire confidence (although, in fairness, many who talk publicly have lawsuits pending against the lab).

"When I was laid off, I walked out for three days in a row with boxes, and no one looked inside them," recalled Richard Crosland, who worked at Usamriid from 1986 to 1997. "I was there for 11 years, and never once did anyone ask, 'Where is the substance you ordered?'

"I could have walked out with it when I left, and no one would have known. I didn't, but I could have. 7-Eleven had better inventory control. And I was working with botulinum, which is one of the deadliest substances on earth.

"If you couldn't find a microscope, you were in real trouble. But if you misplaced five micrograms of botulinum that could kill thousands of people, nobody would notice."

In truth, many microbiology labs are pretty chaotic, and ultimately labs have to pick reliable people and then trust them. But that's what piqued my interest in Usamriid in the first place -- my research about a man I've called "Mr. Z," who has been interviewed four times by the F.B.I. and whose home has been searched twice in connection with the **anthrax** investigation. Usamriid hired Mr. Z in 1997 to work with Ebola and Marburg viruses, although he had spent years in the armed forces of Rhodesia and apartheid South Africa.

Most researchers at Usamriid are dedicated patriots who could earn more in the private sector. When Mr. Z left Usamriid in 1999, he was making $58,000 a year -- and jumped to a $150,000-a-year job with a private contractor. Many biodefense scientists risk their lives working with deadly germs to improve vaccines for American troops, and they deserve our gratitude.

Still, the Army documents indisputably point out serious problems. They recount incidents in 1992 when someone appeared to be working secretly with **anthrax** at night and on weekends and then trying to cover it up. Memos describe how someone tried to roll back a numerical counter on an electron microscope to hide his work with **anthrax**.

As recently as April of this year, **anthrax** spores were found in a hallway and administrative area of Usamriid -- shortly after Senator Mary Landrieu, a Louisiana Democrat, visited the complex. **Anthrax** spores seem to have it in for Democratic senators.

Paul Krugman is on vacation. http://www.nytimes.com

LOAD-DATE: July 19, 2002

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The New York Times On the Web

The Anthrax Files

By NICHOLAS D. KRISTOF

It's time for me to come clean on "Mr. Z."

Since May, I've written periodically about a former U.S. Army scientist who, authorities say privately, has become the overwhelming focus of the investigation into the anthrax attacks last fall. I didn't name him.

But over the weekend, Mr. Z named himself: He is Steven J. Hatfill, 48, a prominent germ warfare specialist who formerly worked in the Army labs at Fort Detrick, Md. Dr. Hatfill made a televised statement on Sunday, describing himself as "a loyal American" and attacking the authorities and the media for trying "to smear me and gratuitously make a wasteland of my life."

The first thing to say is that the presumption of innocence has already been maimed since 9/11 for foreign Muslims, and it should not be similarly cheapened with respect to Dr. Hatfill. It must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of traditional physical evidence linking him to the attacks.

Still, Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax "fall guy." The authorities' interest in Dr. Hatfill arises from a range of factors, including his expertise in dry biological warfare agents, his access to Fort Detrick labs where anthrax spores were kept (although he did not work with anthrax there) and the animus to some federal agencies that shows up in his

private writings. He has also failed three successive polygraph examinations since January, and canceled plans for another polygraph exam two weeks ago.

So far, the only physical evidence is obscure: smell. Specially trained bloodhounds were given scent packets preserved from the anthrax letters and were introduced to a variety of people and locations. This month, they responded strongly to Dr. Hatfill, to his apartment, to his girlfriend's apartment and even to his former girlfriend's apartment, as well as to restaurants that he had recently entered (he is under constant surveillance). The dogs did not respond to other people, apartments or restaurants.

Putting aside the question of Dr. Hatfill and the anthrax, there are two larger issues.

First is the F.B.I.'s initial slowness in carrying out the anthrax investigation. Why did it take nine months to call in the bloodhounds, or to read Dr. Hatfill's unpublished novel, "Emergence," which has been sitting in the copyright office since 1998 and draws on his experiences in South Africa and Antarctica to recount a biological warfare attack on Congress?

Second is the need for much greater care within the U.S. biodefense program. Dr. Hatfill's resume made claims (a Ph.D. degree, work with the U.S. Special Forces, membership in Britain's Royal Society of Medicine) that appear false, but these were never checked.

Moreover, what was a man like Dr. Hatfill who had served in the armed forces of two white racist governments (Rhodesia and South Africa) doing in a U.S. Army lab working with Ebola? With a new wave of funding for smallpox and anthrax research, we must be doubly careful

that the spread of pathogens to new labs solves problems rather than creates them.

The White House is putting strong pressure on the F.B.I. to solve the anthrax murders. Top administration officials would love to find an Iraqi connection, but would settle for solving the case. The F.B.I. director, Robert Mueller, is pushing back, saying that nothing would be worse for the bureau than a premature prosecution that would fizzle in court.

To its credit, in the last few months, the bureau has finally picked up its pace. Its experts in Quantico are belatedly examining anthrax hoax letters sent in 1997 and 1999 that bear fascinating resemblance to the real anthrax letters. Investigators are looking at another hoax letter with intriguing parallels to the real one; that hoax was sent to Senator Tom Daschle from London in mid-November, when Dr. Hatfill was visiting a biodefense center in England.

Partly because of the newfound energy, the F.B.I. has lately been enjoying genuine progress in its anthrax investigation. People very close to Dr. Hatfill are now cooperating with the authorities, information has been presented to a grand jury, and there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him.

EXHIBIT B

Victor M. Glasberg & Associates ATTORNEYS
121 South Columbus Street Alexandria VA 22314
telephone: (703) 684-1100 fax: (703) 684-1104

August 13, 2002

Editor
The New York Times
229 West 43rd Street
New York, NY 10036-3959

Dear Editor:

Nicholas Kristoff's op-ed piece in the August 13 *Times* ("The Anthrax Files") about my client Steven Hatfill is a lame exercise in attempted self-justification. It does nothing to address the ethical issues raised by his past columns virtually accusing Dr. Hatfill (transparently "Mr. Z") of being the anthrax mailer.

Mr. Kristoff's columns raise the issue of the professional and ethical obligations of a widely-read columnist to whom derogatory and uncorroborated information and speculation have been provided about a citizen. In this case, over a period of months Mr. Kristoff wrote awful things about Dr. Hatfill without ever having solicited his side of the story. Even now he has some important facts wrong. Can this possibly represent ethical and professional journalism?

"Putting aside the questions of Dr. Hatfill and the anthrax," as Mr. Kristoff is now happy to do, "there are two larger issues," he writes. One addresses the FBI's alleged "slowness in carrying out the anthrax investigation." Unless

Mr. Kristoff is on the receiving end of a torrent of FBI leaks, he has, in fact, zero knowledge of what the FBI has in fact been doing in its investigation. Unlike Mr. Kristoff, while I deplore the absurdly, counterproductively public investigation which the FBI has been conducting of Dr. Hatfill, I have never doubted that the FBI was on the anthrax case. Mr. Kristoff appears to equate public noise about his "Mr. Z" with activity and progress in the investigation.

Mr. Kristoff's second question addresses the appropriateness of our government's retaining persons whose backgrounds he deems questionable, such as Dr. Hatfill, for work in biodefense programs. The first short answer is that *even now* Mr. Kristoff still has his facts wrong (*e.g.*, Dr., Hatfill never served in the South African armed forces; he was indeed in U.S. Special Forces training until receiving an honorable discharge for medical problems arising out of a parachute jump). The second short answer is that Dr. Hatfill would likely pass whatever vetting even the likes of Mr. Kristoff would subject him to, if it were intended to discern his current suitability for biodefense work and not his political correctness according to Mr. Kristoff's lights. Mr. Kristoff has no capacity to assess that possibility, however, because he is ignorant of basic relevant facts and has already declared his conclusions based on what he thinks he knows.

If there is probable cause to believe that Steven Hatfill is the anthrax mailer, as Mr. Kristoff has implied since May, he should be arrested, charged, and put on trial. Until there is such cause regarding a given suspect or suspects, the investigation into these matters should proceed – as it has not to date, at least as regards Dr. Hatfill – in a lawful, professional, ethical and quiet manner, without making a wasteland of the lives of the persons it touches. As for influential journalists like Mr. Kristoff who are ready to

finger suspects where even the FBI hesitates – they would be well advised to revisit Journalistic Ethics 101.

Sincerely,

Victor M. Glasberg

Hatfill\Letters\NYTimeAugust1302

cc: Steven J. Hatfill, M.D,

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STEVEN J. HATFILL,	)
Plaintiff,	)
vs.	)
	)
THE NEW YORK TIMES COMPANY,	)
Defendant.	)
	)

No. 1:04-cv-807

ORDER

Upon the joint motion of plaintiff Steven J. Hatfill and defendant The New York Times Company to stay proceedings in this action pending the outcome of a petition for a writ of certiorari to be filed in the Supreme Court of the United States with respect to the decision in this matter by the United States Court of Appeals for the Fourth Circuit dated July 28, 2005, and for good cause shown, it is hereby

ORDERED, that all proceedings in this action are stayed until (1) the Supreme Court denies the defendant's petition for a writ of certiorari (or the defendant fails to timely file such a petition), or (2) if said petition is granted, the Supreme Court disposes of the case on the merits, whichever is earlier.

Alexandria, Virginia
November 8, 2005

Claude M. Hilton
United States District Judge

CONSTITUTIONAL PROVISIONS INVOLVED:

First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, United States Constitution

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion

which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(3)

Supreme Court, U.S.
FILED
FEB 2 1 2006
OFFICE OF THE CLERK

No. 05-897

IN THE

Supreme Court of the United States

THE NEW YORK TIMES CO.
Petitioner,

v.

STEVEN J. HATFILL
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT STEVEN J. HATFILL IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment limit the actionable defamatory implications arising from a publication about a matter of public concern to those that a recipient would reasonably conclude the publication, taken as a whole, was intended to convey?

2. Does the First Amendment preclude liability for the tort of intentional infliction of emotional distress based upon the alleged publication of a false and defamatory implication, when the challenged publication involves a matter of public concern and was not written for the specific purpose of inflicting harm on the plaintiff?

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INTRODUCTION

This case does not, in fact, present the "Questions Presented" by The Times. Petitioner's first question seeks review by this Court to ensure that defamation cases will survive motions to dismiss only if the statements at issue may be "reasonably" read, "taken as a whole," to convey a defamatory meaning. But Dr. Hatfill does not dispute that the appropriate (and long-settled) test for defamatory meaning is what a reasonable jury would conclude after reading the articles in their entirety.

Rather, The Times takes issue with the Fourth Circuit's *application* of that test to the specific facts of this case. According to petitioner, the lower court should have begun and ended its analysis with arguably exculpatory statements in The Times's publications at issue, and disregarded the otherwise defamatory character of the articles. The Times thus merely asks this Court to amend the Fourth Circuit's fact-specific application of settled law, and to do so in a manner inconsistent with the requirement—which petitioner itself emphasizes—that defamation be assessed on the basis of the documents "taken as a whole."

Petitioner's second question is similarly flawed and likewise does not warrant this Court's review. Petitioner begins by correctly stating a rule (albeit one inapplicable to respondent, *see infra* n.3) established by this Court: that public figures and public officials may not recover for intentional infliction of emotional distress stemming from publications without showing that a false fact was published with "actual malice." The Times then argues that the Fourth Circuit misapplied that rule in allowing Dr. Hatfill's claim for intentional infliction of emotional distress to proceed for determination of whether, under Virginia law, The Times's

behavior was both "intentional and reckless" and "outrageous and intolerable."

For present purposes, however, the Fourth Circuit *accepted* petitioner's view that this Court has expressed "constitutional limitations" on intentional infliction of emotional distress claims. But the court indicated that whether Dr. Hatfill's intentional infliction claim is constitutionally valid will depend entirely on what the facts ultimately show—he will need to "prove that The Times's misconduct was intentional or reckless" and that "such misconduct was sufficiently outrageous to warrant recovery." The court suggested that such a showing would likely "satisfy constitutional requirements" (*i.e.*, a showing of "actual malice") but found that "at this stage of the litigation," the issue was simply not before it. Again, then, the "Question Presented" by The Times is *not* presented by this case—and even if it were, it would be but another factbound application of settled law not warranting review.

STATEMENT OF THE CASE

In 2002, The New York Times published a series of columns written by Nicholas Kristof strongly implying that Steven J. Hatfill was the "anthrax murderer" who had sent letters containing anthrax in the fall of 2001 that killed five people in the United States. Kristof's first four articles (Pet. 90a-103a) did not *report* investigative interest in Dr. Hatfill, but rather were designed to *create* some. Those articles argued that the Federal Bureau of Investigation was incompetent for failing to investigate Dr. Hatfill more thoroughly. The columns did not suggest that the FBI was incompetent for failing to investigate anyone *other* than Dr. Hatfill.

Kristof's articles contained numerous false allegations in support of the contention that Dr. Hatfill was "a likely

culprit" who "would have been imprisoned long ago" if he were an Arab national, but who had not been arrested because he has "close ties" to governmental officials. *Id.* at 94a-95a. The theme of the fifth article, written after the FBI had destroyed Dr. Hatfill's personal and professional life by labeling him a "person of interest," was that "Dr. Hatfill is wrong to suggest that the F.B.I. has casually designated him the anthrax 'fall guy.'" *Id.* at 104a. That article falsely claimed that Dr. Hatfill had failed three polygraph examinations and summarized other "evidence" supporting the conclusion that "the F.B.I. has lately been enjoying genuine progress in its anthrax investigation." *Id.* at 105a, 106a.

The district court reached the surprising conclusion that taking Dr. Hatfill's allegations as true, The Times's publications could not reasonably be read to convey defamatory meaning. The court therefore dismissed both Dr. Hatfill's defamation and intentional infliction of emotional distress claims under Fed. R. Civ. P. 12(b)(6).

The court of appeals reversed. The Fourth Circuit described the defamation issue as whether "Kristof's columns, taken together, are capable of defamatory meaning." Pet. 21a. Applying Virginia law, the court determined that statements that "impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished" are actionable as defamation *per se*. Pet. 16a. The court found that a reasonable reader of Kristof's columns could believe that Dr. Hatfill

> had the motive, means, and opportunity to prepare and send the anthrax letters in the fall of 2001; that he had particular expertise with powder forms of anthrax, the type used

> in the mailings; that his own anthrax vaccinations were current; that he was the prime suspect of the biodefense community as well as federal investigators; that he had failed numerous polygraph examinations; that specially trained bloodhounds had "responded strongly" to Hatfill, his apartment, and his girlfriend's apartment but not to anyone else or any other location; and that Hatfill was probably involved in similar anthrax episodes in recent years.

Id. at 21a. "Based on these assertions," the court concluded that "a reasonable reader of Kristof's columns likely would conclude that Hatfill was responsible for the anthrax mailings in 2001." *Id.*

The Fourth Circuit expressly considered and rejected petitioner's view that certain cautionary language in the articles would render such a conclusion unreasonable. Specifically, the court wrote that

> [n]otwithstanding Kristof's attribution of certain allegations to unnamed sources, or his caution that readers should entertain a presumption of Hatfill's innocence, or even his statement that the FBI should "end this unseemly limbo by either exculpating Dr. Hatfill or arresting him," the unmistakable theme of Kristof's columns is that the FBI should investigate Hatfill more vigorously because all the evidence (known to Kristof) pointed to him.

Id. at 22a. The court indicated that just as "a defendant cannot escape liability for making a false assertion of fact by prefacing that assertion with 'in my opinion,'" neither "can it

escape liability simply by pairing a charge of wrongdoing with a statement that the subject must, of course, be presumed innocent." *Id.* at 22a-23a. The issue, the court reemphasized, is whether the publications, "*taken together*," are capable of defamatory meaning under Virginia law." *Id.* at 23a (emphasis added). Because Kristof's columns satisfied this standard, "the district court erred in dismissing" Dr. Hatfill's defamation count. *Id.*

With respect to Dr. Hatfill's claim for intentional infliction of emotional distress, the court of appeals noted that Virginia law permitted such claims only where the conduct at issue was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." Pet. 27a. The Fourth Circuit found that the district court erred in concluding that commentary on matters of public concern can *never* meet this standard. Accepting respondent's "allegations as true," the court wrote, "The Times intentionally published false charges" accusing Dr. Hatfill "of being responsible for anthrax mailings that resulted in five deaths, without regard for the truth of those charges and without giving Hatfill an opportunity to respond." *Id.* at 28a. "Given the notoriety of the case, the charge of murder, and the refusal to permit comment by Hatfill's counsel," the court concluded that the "alleged misconduct is extreme or outrageous under Virginia law." *Id.*

The Fourth Circuit further indicated Dr. Hatfill's required showing under Virginia law would likely *also* "satisfy constitutional requirements." *Id.* at 28a-29a. The court found, however, that the issue simply was not before it "at this stage of the litigation," and concluded that Dr. Hatfill had made out a *prima facie* case of intentional infliction of emotional distress sufficient to survive a motion under Fed. R. Civ. P. 12(b)(6). Pet. 29a.

REASONS FOR DENYING THE WRIT

The petition makes little effort to justify certiorari review under this Court's usual standards for issuance of the writ. The Times does not maintain, for example, that there is a relevant split among the federal courts of appeals or state courts of last resort. Nor does petitioner set forth any specific conflict between the decision below and any holding of this Court. In contrast, the petition reveals multiple justifications for *denying* review. Most important, there is no dispute between the parties regarding the legal standards applicable here, and the lower court applied the settled standards. Petitioner merely desires a *different* application of settled law to the specific facts of this case.

I. PETITIONER'S FIRST "QUESTION PRESENTED" INVOLVES ONLY A FACT-SPECIFIC APPLICATION OF SETTLED LAW.

The crux of petitioner's first "Question Presented" is that the Fourth Circuit failed to consider "what a reasonable reader would draw from the columns *as a whole*." Pet. 7 (emphasis added). *See also id.* at 8 ("The panel's decision acknowledges no judicial obligation to consider the columns as a whole in determining the reasonableness of the implied meaning"), 11 (alleging that the court failed to consider the meaning "reasonably conveyed by a publication construed as a whole"), 12 (claiming that the court assessed specific statements "in isolation, . . . without assessing their reasonable meaning in light of the publication as a whole"), and 16 ("[t]he court did not assess whether it was reasonable for a reader to derive [a defamatory] meaning from each of the columns considered in their entirety"). The Times maintains that the lower court's analysis was therefore inconsistent with the general thrust of this Court's decisions, including *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964); *Greenbelt Cooperative Publishing Association v. Bresleri*, 398 U.S. 6 (1970); and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

Contrary to petitioner's suggestion, however, there is no dispute in this case that the Kristof articles must be examined "as a whole and in context" for defamatory meaning.[1] That is settled law. The Times's disagreement with the Fourth Circuit concerns the court's *application* of that law to the specific facts of this case. Below, Dr. Hatfill argued that, taken as a whole, the articles—which, *inter alia*, called him a "likely culprit" in the anthrax mailings; said that if he "were an Arab national, he would have been imprisoned long ago"; berated the FBI for initially failing to place him under surveillance; and falsely claimed that he failed three polygraph tests relating to the anthrax attacks—could be understood by a reasonable jury to convey defamatory meaning. The Fourth Circuit agreed, specifically holding that those statements and others in "Kristof's columns, *taken together*, are capable of defamatory meaning." Pet. 21a (emphasis added).

In its petition, The Times reiterates the argument that it made unsuccessfully below. Specifically, petitioner continues to maintain that certain arguably exculpatory phrases in the articles—including that Dr. Hatfill "'denies any wrongdoing'"; that his friends are "'heartsick'" about suspicions directed against him; that he is entitled to the "'presumption of innocence'"; and that there is no "'physical evidence linking him to the attacks'"—render a defamatory interpretation of the articles unreasonable. Pet. 3-4, 7-8, 16-17, 104a. In other words, in The Times's view, the court of

[1] Appellant's Brief at 27 (citing *Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998)).

appeals should have considered *only* Kristof's various cautionary statements, and not the meaning of the articles as a whole.

But that position is directly contrary to the law as articulated by The Times itself. Kristof's admonitions are not irrelevant, but the columns *must* be viewed "as a whole." The Fourth Circuit reasonably found that the "unmistakable theme" of Kristof's columns was that all the evidence suggested that Dr. Hatfill murdered five innocent people. Against that backdrop, the court correctly concluded that just as "a defendant cannot escape liability for making a false assertion of fact by prefacing that assertion with 'in my opinion,'" neither "can it escape liability by simply pairing a charge of wrongdoing" with cautionary statements such as that the subject must "be presumed innocent." Pet. 22a-23a.

Properly understood, then, this case does not even present The Times's first "Question Presented." Again, that question seeks review by this Court to insure that defamation cases will survive motions to dismiss only if the statements at issue may be "reasonably" understood to convey a defamatory meaning when "taken as a whole." Here, however, the parties and the court below all agree on that rule—The Times simply disagrees with the lower court's application of it to the facts of this case.

Finally, it bears note that the rule in question here is one of *state* law. Indeed, the Fourth Circuit's discussion of the Virginia standard for defamation and its application to this case spans no fewer than nine pages of the petition's appendix. Pet. 15a-23a. That is, moreover, the standard that

The Times itself presented to the Fourth Circuit.[2] The Times did *not* argue in the court of appeals that the First Amendment requires the application of a *different* standard than that contained in Virginia law. Accordingly, the court of appeals applied the legal standard proposed by The Times, and The Times merely disagrees with the court's application of that state-law standard.

II. PETITIONER'S SECOND "QUESTION PRESENTED" INVOLVES ONLY FACT-SPECIFIC APPLICATION OF SETTLED LAW.

Petitioner's second "Question Presented" exhibits essentially the same flaws as its first. Although its argument is difficult to follow, The Times appears to maintain that the Fourth Circuit ignored the "actual malice" requirement of *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). That is incorrect. Rather, the court of appeals applied that standard but, contrary to The Times's arguments, concluded that the complaint alleges an intentional infliction of emotional distress claim that satisfies Virginia law and federal constitutional requirements.

In *Falwell*, this Court held that public figures and public officials may not recover for the tort of intentional infliction of emotional distress without showing that a false statement was made "with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* Under Virginia law, as the Fourth Circuit explained, a plaintiff making a claim for intentional infliction of emotional distress must properly allege conduct on the part of defendant that was both "outrageous and

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[2] Appellee's Brief at 26-27 (citing *Wells v. Liddy*, 186 F.3d 505, 522 (4th Cir. 1999); *Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998)).

intolerable" and "intentional and reckless." Pet. 27a. Before the Fourth Circuit, The Times argued (primarily) that it had not acted outrageously and intolerably, Appellee's Brief at 44-47, and (secondarily) that it had not acted intentionally and recklessly, Appellee's Brief at 47-48. The Times did *not*, however, contend that the First Amendment requires *more* of a showing on the latter point than does Virginia law.

The Fourth Circuit properly rejected The Times's arguments. The court explained that Dr. Hatfill's complaint alleges that "The Times intentionally published false charges accusing him of being responsible for anthrax mailings that resulted in five deaths, without regard for the truth of those charges and without giving Hatfill an opportunity to respond." Pet. 28a. Those allegations—and specifically that "The Times intentionally published false charges . . . without regard to the truth of those charges"—fully satisfy the actual malice standard. Again, that standard requires proof that the defendant acted "with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Falwell*, 485 U.S. at 56.

The Times is therefore simply wrong to claim that the Fourth Circuit "has gone so far as to disregard the central tenet of *Falwell*." Pet. 24. In this case, Virginia law required Dr. Hatfill to allege (and will ultimately require that he show) that The Times acted with reckless disregard of the truth of its allegations. That is what this Court required in *Falwell*.[3]

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[3] Moreover, in *Falwell* this Court enunciated that standard with respect to intentional infliction of emotional distress claims brought by "public figures and public officials." 485 U.S. at 56. Dr. Hatfill was not a public official and he was not a public figure when The Times started publishing the articles at issue.

On pages 22-23 of its petition, The Times highlights a number of mostly district court cases, albeit without claiming that the decision below created any split with those cases that would justify review under this Court's certiorari standards. Indeed, it does not.

In discussing those cases, The Times first argues that "some courts" have held that a claim for intentional infliction of emotional distress is not available when it would simply "duplicate" a claim for libel. Pet. 22 (citing *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 510 (1st Cir. 2002), and *Chaiken v. VV Publ'g Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995), *aff'd*, 119 F.3d 1018 (2d Cir. 1997)). Petitioner neglects to mention, however, that the *Moss* court so held as a matter of *state* law. 312 F.3d at 510 ("New Hampshire law does not recognize a cause of action for wrongful infliction of emotional distress where the factual predicate sounds in defamation."). *Chaiken*, in contrast, held nothing of the sort—it merely recited the *Falwell* requirement of "actual malice" and interpreted it to necessitate a showing of "gross irresponsibility" to prevail on a claim of intentional infliction of emotional distress. There is plainly no conflict (nor even tension) between these holdings and the case below. Moreover, Dr. Hatfill expressly disclaimed duplicative damages. Appellant's Brief at 59.

The Times next points out that some courts require plaintiffs alleging intentional infliction of emotional distress to "plead and prove the added element that defendant published allegedly false facts specifically to cause harm to the plaintiff," while other courts do not. Pet. 23. The cases upon which petitioner relies, however, illustrate only the unsurprising fact that the elements of the common law tort of intentional infliction of emotional distress vary from state to state. *See, e.g., Lambert v. Garlo*, 484 N.E.2d, 260, 264 (Ohio Ct. App. 1985) (reciting different Ohio standards that,

in some circumstances, require showing that the publication is not a matter of legitimate public concern); *Levin v. McPhee*, 917 F. Supp. 230, 242 (S.D.N.Y. 1996), *aff'd*, 119 F.3d 189 (2d Cir. 1997) (interpreting New York law to require the conduct allegedly causing the emotional distress to be "intentionally directed at the plaintiff without any reasonable justification"); *Bell v. The National Republican Congressional Committee*, 187 F. Supp. 2d 605, 618 (S.D. W. Va. 2002) (interpreting West Virginia law to require recklessness and outrageousness, but no "intentional direction" of emotional harm at plaintiff). Clearly, however, the undeniable fact that the common law of different states may contain different elements for the same tort does not remotely call for review by this Court.

The Times also asserts that a "body of cases" flatly holds that speech about matters of public concern can never be sufficiently outrageous to support a claim of intentional infliction of emotional distress. Pet. 23. The lone circuit case cited by petitioner, however, does not hold that at all. *See Ruffin-Steinback v. dePasse*, 267 F.3d 457, 465 (6th Cir. 2001) (upholding district court finding under Michigan law that the defendant's particular acts could not reasonably be considered outrageous and were not tortious in any sense); *see also Ruffin-Steinback v. dePasse*, 82 F. Supp. 2d 723, 735 (E.D. Mich. 2000). And the lower court cases cited by petitioner only again underscore that different states have different law on intentional infliction of emotional distress. *See, e.g., Tackett v. KRIV-TV (Channel 26)*, 1994 WL 591637, at *2 (S.D. Tex. May 5, 1994) (indicating that Texas does not recognize the tort at all). As noted above, however, this Court has no place reviewing divergences among the states on matters of state law.

Finally, in the court of appeals, The Times also argued that Dr. Hatfill's intentional infliction of emotional distress

claim constituted an "end run" around the constitutional limitations on defamation claims. Appellee's Brief at 51-53. The court of appeals responded that there is likely no "end run" issue here at all because, in its view, Dr. Hatfill likely could not prevail on an intentional infliction of emotional distress claim if he could not prevail on a defamation claim. *See* Pet. 28a-29a. At any rate, the court found that at this stage of the proceeding—addressing a motion to dismiss under Rule 12(b)(6)—it need concern itself only with "whether Hatfill's allegations, taken as true, describe intentional and outrageous conduct." Pet. 29a.

Thus, contrary to The Times's claim, the Fourth Circuit did not conclude that there is "no First Amendment bar to liability" for intentional infliction of emotional distress even if the First Amendment bars liability for defamation. Pet. 24. All the court concluded is that Dr. Hatfill adequately alleged that The Times acted outrageously and intentionally, which is sufficient to satisfy *both* Virginia law and the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
MAR 7 - 2006
OFFICE OF THE CLERK

No. 05-897

IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY

Petitioner,

- v.-

STEVEN J. HATFILL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner The New York Times Company respectfully submits this Reply Brief in support of its Petition for a Writ of Certiorari.

1. Respondent incorrectly argues that the decision below involves the simple application of an undisputed principle of state common law to the facts of this case. To the contrary, the question presented is whether the court below transgressed the boundary marked by the First Amendment in applying the common law. In this regard, the Fourth Circuit's broad view of libel claims that may be pursued based on the pleading of implied meaning contradicts and thereby undermines established First Amendment principles governing speech on matters of public concern.

First, the decision below permits claims for libel by implication arising from speech on matters of public concern to proceed if specific statements in a publication could, *in isolation*, give rise to a defamatory implication. But this Court's articulation of the protection afforded by the First Amendment to speech on matters of public concern has heretofore required judges to consider an allegedly defamatory statement in the context of the publication as a whole, and this constitutional principle should apply equally to allegedly defamatory implications. While the parties here agree that the law permits a cause of action for defamation to be based on an implication "reasonably conveyed" by a publication read "as a whole and in context," such a standard was neither articulated nor applied by the court of appeals in this case. Rather, the *only* standard the Fourth Circuit *said* it was applying is whether an alleged "'inference, implication or insinuation'" of plaintiff's guilt reasonably arises from "'allegedly defamatory words'" in the columns "'taken in their plain and natural meaning.'" App. 17a (citations omitted). Applying this standard, the Fourth Circuit considered only the specific factual statements alleged by Respondent to be false and, giving them "'every fair inference that may be drawn'" in his favor, concluded that "these assertions" could indeed imply that he had committed a crime. App. 17a, 21a, 23a (citations omitted). In so holding, the Fourth Circuit never acknowledged any judicial obligation to weigh such reported facts against the columns' express disavowals that they were accusing Respondent of guilt and, in determining whether the columns could reasonably be deemed to communicate an implied defamatory meaning, did not do so.

Respondent latches onto the court of appeals' reference to the meaning of four challenged columns "taken together," Resp. Br. at 3, 5, but this refers only to the fact that the

specific factual statements the Fourth Circuit found capable of conveying an implication of guilt were drawn from four different columns that "taken together" could imply that Respondent had committed a crime.[1] The opinion below makes plain that the panel majority did *not*, as Respondent infers, consider the disavowals and weigh the columns "as a whole." To the contrary, the opinion expressly rejects any such obligation, dismissing the disavowals as legally irrelevant.[2] Respondent is simply wrong in urging that the uncontested state law standard was applied, and has no answer to the conflict between the much more narrow standard used by the Fourth Circuit and the standard used by many other Courts of Appeals and state courts of last resort when addressing similar claims of libel by implication. *See* Pet. at 15-16 (citing cases).

Second, and more fundamentally, Respondent's claim that the Fourth Circuit simply applied a settled common law standard is beside the point. This Court has recognized that there is a constitutional boundary that limits the ability of state law to punish speech about matters of public concern. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

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[1] Respondent attempts to bolster the Fourth Circuit's conclusion by arguing that the columns did not criticize the FBI "for failing to investigate anyone *other* than Dr. Hatfill." Resp. Br. at 2 (emphasis in original). While the columns did not name any other scientist, they did refer to Respondent as one "example" of a "handful of people" who had the capability to pull off the mailings, App. 92a, and objected to the FBI's failures in investigating generally the "scientists at two suspect labs," App. 94a.

[2] *See* App. 22a (courts need not consider impact of express disclaimers any more than they must consider the words "'in my opinion'") (citation omitted). To the extent the panel majority recognizes any overall meaning of the columns as a whole, it is that their "unmistakable theme" calls for "the FBI [to] investigate Hatfill more vigorously." *Id.* This is hardly an accusation of guilt, particularly given the columns' express denial of any such accusation.

(application of common law "of and concerning" limitation to a claim for libel violates the First Amendment). Among other things, the First Amendment limits the methods by which a court determines whether a statement is susceptible to an actionable defamatory meaning. *See, e.g., Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970); *see* Pet. at 13-14. This case should be reviewed by this Court precisely because the Fourth Circuit crossed the constitutional boundary. It articulated the scope of the judicial inquiry with respect to defamatory meaning so strictly that—whether consistent with state law or not—it failed, as did the lower court in *Bresler*, to afford the level of protection the Constitution requires to speech about matters of public concern.

"The consequences . . . for the First Amendment" of requiring a publisher to defend an implication of guilt allegedly conveyed by criticisms of an important government investigation, as Judge Wilkinson explained below, "run deep." App. 73a. The contours of the constitutional protection afforded defendants facing claims of libel by implication have yet to be defined by this Court, and this case provides the appropriate vehicle to clarify the requirements of the First Amendment in this important area.

2. Respondent does not dispute that the lower courts have taken confused and vastly inconsistent approaches in their attempts to resolve the obvious constitutional tension created when tort claims for the intentional infliction of emotional distress are based solely on the publication of information about matters of public concern. *See* Pet. at 22-24. Rather, Respondent (1) discounts as involving "state law" cases such as *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 510 (1st Cir. 2002), that prohibit intentional

infliction claims when they duplicate a claim for libel,[3] (2) sidesteps cases requiring a specific intent to cause harm when emotional distress is allegedly the result of a publication,[4] and (3) shrugs off a wide body of case law in which courts have held that even false speech about matters of public concern was not "outrageous" within the meaning of this tort as a matter of law.[5] Resp. Br. at 11-12. According to Respondent, none of these cases create a "split" with the holding below. This observation, however, is beside the point. The fact remains that, unlike the decision below, all of these cases limit the reach of the intentional infliction

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[3] *See* Pet. at 22-23 (citing cases); *see also Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408 (C.D. Cal. 1987) (no claim for emotional distress based on defamation), *aff'd on other grounds*, 867 F.2d 1188 (9th Cir. 1989); *Barker v. Huang*, 610 A.2d 1341 (Del. 1992) (same); *Zazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. 1993) (en banc) (same). The court in *Chaiken v. VV Publishing Corp.*, 907 F. Supp. 689, 699 (S.D.N.Y. 1995), *aff'd*, 119 F.3d 1018 (2d Cir. 1997), also rejected a duplicative claim for intentional infliction, but as Respondent notes, did so because the Complaint failed to allege the requisite fault.

[4] *See* Pet. at 23 (citing cases).

[5] *Id.*; *see also Ruffin-Steinback v. dePasse*, 267 F.3d 457, 465 (6th Cir. 2001); *Levin v. McPhee*, 917 F. Supp. 230, 242 (S.D.N.Y. 1996), *aff'd on other grounds*, 119 F.3d 189 (2d Cir. 1997); *Cook v. Winfrey*, 141 F.3d 322, 330-31 (7th Cir. 1998) (noting that many Illinois courts dismiss claims of intentional infliction based on defamation because the conduct is "not 'extreme and outrageous'"); *see generally Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993) ("publication – without more – could not ordinarily lead to liability for intentional infliction of emotional distress"). Respondent incorrectly describes *Tackett v. KRIV-TV* as holding that "Texas does not recognize the tort at all." Resp. Br. at 12. *Tackett* does reject any cause of action for *negligent* infliction of emotional distress, but does recognize the tort of *intentional* infliction. To protect speech, the court in *Tackett* prohibits claims for intentional infliction that are based on the publication of "potentially defamatory statements." *Tackett v. KRIV-TV*, Civ. A. No. H-93-3699, 1994 WL 951637, at *2 (S.D. Tex. May 5, 1994).

tort in a manner that avoids the constitutional conflict that would otherwise arise when its vague "outrageous" standard is applied to speech about public matters.

The Fourth Circuit's rejection of all of the limiting factors other courts have crafted in the absence of guidance from this Court underscores the very real conflict between its holding and the First Amendment. As Judge Wilkinson noted, "[t]he panel offers no decision from Virginia or any other state that holds a news report on a subject of unquestioned public interest to be an intentional infliction of emotional distress." App. 72a.

The Petition should be granted because the record in this case squarely frames the constitutional issue presented when the tort of intentional infliction of emotional distress is applied to a newsworthy publication, and this case provides an appropriate vehicle to resolve the existing confusion among the lower courts. The current diversity of approaches itself serves to inhibit speech about matters of public concern, a situation that will only be exacerbated if the Fourth Circuit's decision is permitted to stand.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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March 7, 2006

(2) No. 05-897

Supreme Court, U.S.
FILED
FEB 21 2006
OFFICE OF THE CLERK

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v.

STEVEN J. HATFILL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Stone v. Banner Publishing Corp., 677 F. Supp. 242 (D. Vt. 1988) 9

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1 Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* (3d ed. 2005) 9, 13

2 Rodney Smolla, *Law of Defamation* (2d ed. 2004) 8

INTEREST OF *AMICI CURIAE*[1]

Amici are 32 newsgathering entities, media organizations, and reporters' groups from across the country whose reporters and members regularly report on government investigations.[2] As members of the press, *Amici* represent what this Court has called the "constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). *Amici* take this public responsibility seriously and have a strong interest in ensuring that the press retains its historic role as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences," *Estes v. Texas*, 381 U.S. 532, 539 (1965).

Amici are regularly confronted with the question whether and how to report on government investigations or other government statements or actions that are of obvious public import but that carry with them the risk that the media, as the messenger of a truthful report about government activity, will be held liable for a perceived implication that the target of an investigation or governmental allegations is in fact guilty of wrongdoing. This case vividly illustrates the point, for the investigation at issue dealt with a matter of the utmost public interest and concern – biological terrorism that had already taken several lives.

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[1] Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *Amici* or their counsel, contributed monetarily to the preparation or submission of this brief.

[2] A complete list of *Amici* is set out in the Appendix to this brief.

The lower courts are divided and confused over the degree of constitutional protection from common law defamation liability that press reports on government investigations should enjoy. That confusion is compounded by the decision below, which held that the press may be found liable for a report on an ongoing government investigation even where the report is accurate and expressly disavows any implication that the government's target has actually engaged in wrongdoing. The resulting uncertainty about the status of reporting on such government activities chills the ability of the press to report on matters of great public concern. As a result, the public will be deprived of important information about the workings of its government, in direct contravention of key First Amendment principles. *Amici* thus have a strong interest in this case.

INTRODUCTION

Amici agree with Petitioner that this Court should grant a writ of certiorari to clarify that the First Amendment requires courts to consider the reasonably intended meaning of an allegedly defamatory publication taken as a whole before imposing libel-by-implication liability, and that the tort of intentional infliction of emotional distress cannot, consistent with constitutional principles, be applied to the type of reporting at issue in this case. *Amici* submit this brief to point out that a proper resolution of the first question presented – establishing a constitutional limit on the defamatory meaning that can be extracted by implication from an otherwise truthful report on a matter of public interest – would also resolve a significant issue bearing upon press freedom that is causing a troubling degree of confusion among the federal and state courts.

That issue is the extent to which the First Amendment shields truthful reporting on government investigations and other government actions or statements. As shown below,

this is an area in which the importance of a free press for the effective functioning of our democratic system is at its apex and where, because of the sensitive nature of the matters reported on, there is an urgent need both for greater clarity and for adequate protection against defamation claims based on accurate reporting. This Court should grant review and recognize a constitutional rule that a defamation claim cannot be based on an alleged implicit defamatory meaning when the news report or commentary merely describes accurately the actions taken or statements made by the government.

SUMMARY OF ARGUMENT

As this case illustrates, the press is vulnerable to potentially crippling – and speech-chilling – liability and litigation for publishing reports on government investigations or charges under the common law republication and libel-by-implication doctrines. These doctrines threaten the press with liability for publishing accounts of government investigations, even where the report is accurate and the actions of the government are of high public importance. Reporting on government investigations – including where, as here, the reporting is critical of the government's performance – is essential to informing the public fully about the actions of its government. Indeed, the role of the press is most important where the government's actions are misdirected or abusive. Yet a reporter's awareness in such cases that government charges are suspect could assist the plaintiff in establishing "actual malice" in a defamation suit based on the reporting. In these circumstances, the key limits on defamation liability recognized by this Court – truthful reporting and the "actual malice" standard – offer no real protection.

Amici submit that the First Amendment's protections for press reporting on matters of public concern require a rule limiting the media's liability for accurate accounts of

government investigations or charges, at least in situations where the common law would not provide a fair report privilege. Recognizing the need to protect this important contribution to public discourse, many courts have rejected defamation claims against news outlets for publishing these types of reports. In reaching this result, however, courts have relied on a patchwork of disparate and often inconsistent rationales, some based on the First Amendment, others on the common law. Other courts have denied protection altogether. The Court of Appeals' decision adds to this confusion, and would force media entities to validate not only the accuracy of their reports on the government action itself, but also the truth of the underlying government accusation. As a result of this judicial confusion, *Amici* are frequently uncertain as to whether reporting of this type will subject them to protracted litigation and potential liability. This uncertainty threatens to stifle reporting on matters of vital public interest even where, as here, the reports expressly decline to accuse a citizen and instead criticize the government's investigation.

The Court should grant the writ to resolve this confusion and to establish a uniform rule that protects such reporting by limiting defamation claims based on alleged implications arising from truthful reports on matters of clear public interest. This Court has explained that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 12 (1970) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). Because "the threat or actual imposition of pecuniary liability for alleged defamation may impair the unfettered exercise of these First Amendment freedoms, the Constitution imposes stringent limitations upon the permissible scope of such

liability." *Id.* A rule limiting media liability for accurate reporting on government actions is consistent with this Court's previous decisions establishing constitutional limits on the reach of common law defamation liability, as well as with its recognition of the important First Amendment role of the press.

ARGUMENT

I. COURTS ARE DIVIDED OVER THE LEVEL OF PROTECTION AFFORDED REPORTING ON GOVERNMENT INVESTIGATIONS.

At present, the law is unsettled regarding whether, and to what extent, accurate news reports of government investigations or similar government actions are entitled to protection against common law defamation liability. Many courts properly decline to hold the press liable for such reports, relying on a panoply of rationales and crafting a broad range of legal protections for such reports. Other courts have refused to recognize any protection, either based on the Constitution or existing at common law, for accurate reporting on "unofficial" government proceedings. The decision below highlights both the serious threat to press freedom in this area and the need for clear limits on liability so as to ensure the continued free flow of information on matters of public importance.

A. Inconsistent Interpretations of the Common Law Leave the Press Vulnerable to Lawsuits Based on Accurate Reporting of Government Activities.

As this case demonstrates, the press faces significant legal exposure under common law theories of defamation when it reports on government investigations – even if the reports accurately describe the investigations, and even if the government's actions implicate matters of profound public interest. Central to the problem is the common law

republication doctrine, which imposes liability on a speaker for republishing a defamatory statement originally made by another. *See, e.g., Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 190 (3d Cir. 1998); *Lee v. Dong-A Ilbo*, 849 F.2d 876, 878 (4th Cir. 1988); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1298 (D.C. Cir. 1988); *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980); *Restatement (Second) of Torts* § 578 (1977) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."). As the Fourth Circuit has recognized, "[l]iteral adherence to [the republication] rule would sap the vigor of public debate, and could frighten the press from even reporting to the public the few debates that might occur." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1097 (4th Cir. 1993). This is not a speculative concern; defamation litigants have used the republication doctrine to argue that media defendants are liable for the ultimate truth of defamatory allegations made by government officials, even where the fact that the government officials are making such allegations is itself newsworthy. *See, e.g., Global Relief Foundation, Inc. v. New York Times Co.*, 390 F.3d 973, 980-81 (7th Cir. 2004); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 369-70 (S.D.N.Y. 1998); *Jackson v. Paramount Pictures Corp.*, 68 Cal. Rptr. 2d 1, 12 (Cal. Ct. App. 1998); *Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987); *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990).

Further compounding the press's exposure is the theory of liability advocated by Respondent here, that of "libel by implication." Libel by implication imposes liability on a publisher when a publication could trigger a defamatory implication or innuendo. *See, e.g., Black's Law Dictionary* 934 (8th ed. 2004) (defining libel by implication as "[l]ibel that creates a false implication or impression even though each statement in the article, taken separately, is true.").

These two common law principles, taken together, mean that accurate reporting on the government's investigation of a crime, which often includes the names or descriptions of persons being investigated, may be read to convey a defamatory implication of wrongdoing, and thus expose the publisher to expensive litigation and potential damages. And at least according to the court below, the press may be held liable even when its reports expressly *disavow* the allegedly defamatory implication.

The common law itself privileges "fair reports" of government proceedings, in recognition of the public value of such reports. *See generally Restatement (Second) of Torts* § 611. But that privilege is applied inconsistently and often so restrictively that reports on "unofficial" or informal government actions, or on nonpublic statements by government officials, are left unprotected. *See Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 332 (Minn. 2000) ("[T]he patchwork nature of the law of defamation and confusion across jurisdictions makes articulating a clear statement concerning a majority or minority position on section 611 [of the *Restatement of Torts*] difficult."); *see also* W. Page Keeton, *Prosser and Keeton on Torts* § 111, at 772 (1984).

Some courts have held that the fair report privilege extends to confidential or secret government proceedings, or to preliminary or informal reports preceding formal government action. *E.g.*, *Chapin*, 993 F.2d at 1097 (concluding that fair report privilege covered republication of potentially derogatory remark made by congressman even though it was not made in a formal and public setting); *Crane v. Ariz. Republic*, 972 F.2d 1511, 1519 (9th Cir. 1992) (applying privilege to secret congressional committee investigation); *Reeves v. Am. Broad. Cos., Inc.*, 719 F.2d 602, 606 (2d Cir. 1983) (holding that, under California law,

the fair report privilege "extends to any statement, whether or not true, made in the course of a secret judicial proceeding, since public policy requires witnesses to feel unconstrained to give testimony before investigative bodies without fear of later liability for defamation."); *Medico v. Time, Inc.* 643 F.2d 134, 137-46 (3d Cir. 1981) (holding that fair report privilege under Pennsylvania law covered preliminary FBI reports not generally available to the public); *see also Dorsey v. Nat'l Enquirer*, 973 F.2d 1431, 1434-35 (9th Cir. 1992) (fair report privilege covers reports of non-public family court proceedings).

These rulings recognize the core First Amendment value that underlies the common law fair report privilege – the principle that the public is entitled to know about the workings of its government and that the press serves as a critical conduit for that information. *See Restatement (Second) of Torts* § 611 cmt. a ("The basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings."); 2 Rodney Smolla, *Law of Defamation* § 8:67 (2d ed. 2004) ("The fair report privilege is thus a common law doctrine that partakes of values at the very core of first amendment jurisprudence, the political enlightenment function of the first amendment."). Courts often cite this rationale as grounds for recognizing some formulation of the fair report privilege. *See, e.g., Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 713 (4th Cir. 1991) (en banc); *Medico*, 643 F.2d at 141-43; *Moreno*, 610 N.W. 2d at 332-33; *Hayes v. Newspapers of N.H., Inc.*, 685 A.2d 1237, 1238-39 (N.H. 1996).[3]

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[3] Further, in many of its formulations, the fair report privilege holds that a publisher's liability for reports about government proceedings turns on the accuracy of the description of the proceeding – not the truth or falsity of the underlying statements or assertions being reported. *See, e.g.,*

Many other courts, however, hew to the limitations established by the *Restatement*, which provides that "[t]he publication of defamatory matter concerning another in a report of an *official* action or proceeding or of a meeting *open to the public* that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." *Restatement (Second) of Torts* § 611 (emphasis added); *see, e.g., Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1086 n.26 (3d Cir. 1988); *Stokes v. CBS Inc.*, 25 F. Supp. 2d 992, 1007-08 (D. Minn. 1998); *Stone v. Banner Publ'g Corp.*, 677 F. Supp. 242, 246 (D. Vt. 1988); *Jones v. Taibbi*, 512 N.E.2d at 267; *Wynn v. Smith*, 16 P.3d 424, 430 (Nev. 2001); *Wright v. Grove Sun Newspaper Co.*, 873 P.2d 983, 987-89 (Okla. 1994). Still other courts believe the *Restatement* formulation is too broad. *See, e.g., WKRG-TV, Inc. v. Wiley*, 495 So. 2d 617, 618-19 (Ala. 1986) (rejecting *Restatement* formulation and concluding that Alabama's fair report privilege "is much more limited, and would correspond at most to the 'official action or proceeding' portion of the rule."); *Sciandra v. Lynett*, 187 A.2d 586, 589 (Pa. 1963) (accepting § 611, but retaining Pennsylvania's own common law interpretation of the privilege's limitations).[4]

Medico, 643 F.2d at 138 ("The privilege thus permits a newspaper or other press defendant to relieve itself of liability without establishing the truth of the substance of the statement reported."); *Hurst v. Capital Cities Media, Inc.*, 754 N.E.2d 429, 434-35 (Ill. App. Ct. 2001).

[4] In another wrinkle to the judicial debate over the fair report privilege, some courts hold that the privilege can be defeated by a showing of ill will or in situations in which the reporter suspects that the government's accusations are false. *See* 1 Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* § 7.3.2.2.1 (3d ed. 2005); *see, e.g., Doe v. Doe*, 941 F.2d 280, 289 (5th Cir.), *modified on reh'g*, 949 F.2d 736 (5th Cir. 1991); *Schiavone Const. Co. v. Time, Inc.*, 735 F.2d 94, 97 (3d Cir. 1984); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 78 (W. Va. 1984).

The result is insufficient protection for highly important speech. Government investigations may be at their most newsworthy prior to their culmination in an officially promulgated accusation against a particular individual, and the press should be permitted to report accurately on such investigations without fear of liability or burdensome litigation. *See Chapin*, 993 F.2d at 1097 ("[F]rom the public's viewpoint, a higher proportion of the 'unofficial' public statements of congressmen will be newsworthy and of concern than will the countless 'official' documents generated by quasi-public agencies."). A press that can reprint only formal government statements would fail to play its important constitutional role of "keeping officials elected by the people responsible to all the people whom they were selected to serve," *Mills v. Alabama*, 384 U.S. at 219. This point is exemplified by the facts of this case, which involve a series of newspaper columns critical of the government's lackadaisical handling of an extremely important investigation. Similar examples abound, including in recent years the Wen Ho Lee affair and the Atlanta Olympics bombing investigation. A free press cannot be effectively barred from telling the public about such matters of clear public import, just because of the possibility that an investigation may have focused on the wrong person.

B. Some Courts Protect the Press from Liability for Accurate Reports on Government Actions and Other Matters of Public Interest, But the Holdings Are Inconsistent and Unevenly Applied.

Recognizing the important First Amendment interests at stake, courts have constructed a patchwork of constitutional doctrines to protect reporting on government proceedings that are not considered "official." But, here again, for every decision applying one of those protective rules, there is another that rejects such defenses and leaves the news media

exposed to potential liability for accurate reports on investigations or other government activities that might lead some to conclude that the plaintiff is guilty of wrongdoing.

One approach – a corollary to the constitutional rule advocated here – limits the "capable of defamatory meaning" test by holding that the media are not liable for accurate reports of government investigations. For example, in *Foley v. Lowell Sun Publishing Co.*, the Massachusetts Supreme Judicial Court held that a newspaper report on the plaintiff's arrest for assault was not susceptible of a defamatory meaning because "a reasonable reader could not conclude that the Sun was accusing Foley of assaulting the officer." 533 N.E.2d 196, 197 (Mass. 1989). The court explained: "When the statement is read in the context of the article as a whole, its clear meaning is to report that Foley was arrested for assaulting an officer – and not that he either had been convicted of the offense or had actually committed the assault." *Id.*; *see also White v. Fraternal Order of Police*, 909 F.2d 512, 525-26 (D.C. Cir. 1990); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1439-40 (8th Cir. 1989); *cf. Forsher v. Bugliosi*, 608 P.2d 716, 722-23 (Cal. 1980) (statements in book *Helter-Skelter* not reasonably capable of being read as implicating plaintiff in murder). In holding that accurate reports of government allegations of wrongdoing are not reasonably capable of being read as endorsements of such allegations, these courts implicitly or explicitly recognize that allowing reports to be characterized as defamatory would stifle reporting about matters of vital public interest.

A related group of decisions reaches much the same result. They limit the reach of the republication and libel-by-implication rules by assessing the "substantial truth" of news accounts of government investigations, focusing on the reports' accuracy in describing the government action – *not* the truth of the underlying allegations. In *Global Relief*

Foundation, Inc. v. New York Times Co., for example, the Seventh Circuit found media reports that the plaintiff was a target of a federal investigation into the sources of funding for terrorism to be substantially true and therefore not actionable. 390 F.3d 973 (7th Cir. 2004). In so holding, the court rejected the plaintiff's argument that the "media defendants must be able to prove the truth of the government's charges before reporting on the investigation itself." *Id.* at 987; *see also Green v. CBS, Inc.*, 286 F.3d 281, 284 (5th Cir. 2002) ("In cases involving media defendants, such as this, the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported."); *Janklow v. Newsweek, Inc.*, 759 F.2d 644, 649 (8th Cir. 1985); *Jewell*, 23 F. Supp. 2d at 367-69 (finding no viable libel claim arising from an accurate report that plaintiff was a "prime suspect" in the Olympic bombing, even though no charges were ever filed); *Basilius v. Honolulu Publ'g Co.*, 711 F. Supp. 548, 550-51 (D. Haw. 1989) (finding no libel claim based on accurate report that plaintiff was accused in an anonymous letter of playing a role in an assassination), *aff'd*, 888 F.2d 1394 (9th Cir. 1989) (unpublished table decision); *McIlvain*, 794 S.W.2d at 16 (report on city investigation substantially true where the defendant's "broadcast statements are factually consistent with [the public agency's] investigation and its findings"); *Jackson*, 68 Cal. Rptr. 2d at 11-12.

This line of cases recognizes, implicitly or explicitly, that limiting the scope of the republication rule in this manner is critical to providing the press with sufficient "breathing room" to report on matters of public interest. "Otherwise, the media would be subject to potential liability every time it reported an investigation of alleged misconduct or wrongdoing by a private person, public official, or public figure. Such allegations would never be reported by the media for fear an investigation or other proceeding might

later prove the allegations untrue, thereby subjecting the media to suit for defamation." *KTRK Television v. Felder*, 950 S.W.2d 100, 106 (Tex. Ct. App.–Hous. (14th Dist.) 1997). Other courts, however – including the Court of Appeals in this case – have held that media defendants reporting on government inquiries are responsible for the truth of the underlying charge. *See, e.g., Jones v. Taibbi*, 512 N.E.2d at 265-66 (concluding, in suit over broadcast report of allegations made by a private third party, that "the defendants cannot escape liability merely by attributing defamatory statements or actions to a third party. It is the truth of the underlying defamation that must be shown in order to establish the defense of truth."); *Action Repair, Inc. v. Am. Broad. Cos.*, 776 F.2d 143, 149 (7th Cir. 1985); *Martin v. Wilson Publ'g Co.*, 497 A.2d 322, 329-30 (R.I. 1985).

Under yet another approach, some courts treat media accounts of criminal investigations or other controversial issues as non-actionable opinion. *See, e.g. Levin v. McPhee*, 119 F.3d 189, 196-97 (2d Cir. 1997) (finding that defendant used a number of clear signals to indicate to the reader that the version of the events presented was nothing more than conjecture and speculation); *see also Brown v. Hearst Corp.*, 862 F. Supp. 622, 629 (D. Mass. 1994) (implication in news report that defendant was responsible for wife's murder treated as non-actionable "opinion based on conjecture and speculation"), *aff'd*, 54 F.3d 21 (1st Cir. 1995); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir. 1986) (en banc); 1 *Sack on Defamation* § 2.4.19 (stating that many courts "view communications that in other circumstances might be considered defamatory statements of fact as protected statements of opinion, given the public-issue context in which they arise"). Again, however, this approach is inconsistently applied and has been explicitly repudiated by some courts. *See, e.g. Condit v. Dunne*, 317 F. Supp. 2d

344, 361-70 (S.D.N.Y. 2004); *Catalano v. Pechous*, 419 N.E.2d 350, 356-57 (Ill. 1980).

Finally, some courts have recognized a constitutionally based "neutral report" privilege, which protects reporting on serious, newsworthy charges made by public figures. *See, e.g., Edwards v. National Audubon Soc., Inc.*, 556 F.2d 113 (2d Cir. 1977). As the Second Circuit has explained, "[w]hat is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation." *Id.* at 120. The neutral report privilege is generally understood to protect a publisher who (1) neutrally and accurately reports, (2) charges made by a responsible and prominent speaker, (3) concerning public figures, (4) where the accusations are themselves newsworthy. *See, e.g., Price*, 881 F.2d at 1434; *Edwards*, 556 F.2d at 120.

Like the fair report privilege, the neutral report privilege has been applied inconsistently. Not every jurisdiction that has adopted the neutral report privilege has required the allegations to come from a reputable source. In *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984), for example, the court extended the privilege to a case in which the source of the statement was a convicted felon. Neither is there consistency as to whether the privilege extends to cases involving both public- and private-figure plaintiffs. *Compare April v. Reflector-Herald, Inc.*, 546 N.E.2d 466, 469 (Ohio Ct. App. 1988) (finding "no legitimate difference" between private and public plaintiffs for purposes of applying the privilege), *with Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977) (limiting the privilege to cases involving public figures and rejecting its application to cases

involving private-figure plaintiffs, regardless of newsworthiness). The neutral report privilege has also been rejected in its entirety by several courts. *See, e.g.*, *Dickey v. CBS, Inc.*, 583 F.2d 1221, 1226 (3d Cir. 1978); *Tunney v. Am. Broad. Co.*, 441 N.E.2d 86, 92 (Ill. App. Ct. 1982); *Postill v. Booth Newspapers, Inc.*, 325 N.W.2d 511, 517-18 (Mich. Ct. App. 1982); *Norton v. Glenn*, 860 A.2d 48, 58-59 (Pa. 2004), *cert. denied*, 125 S. Ct. 1700 (2005).

As with the other theories discussed above, the neutral report privilege reflects judicial recognition of the need to protect news reports about important matters to ensure an informed populace. Nevertheless, it is unevenly applied and, in its most common formulation, may not apply to reports that do not concern "official" government statements.

In sum, when the press attempts to decide whether and how to report about a governmental investigation or accusation of great public importance – such as the anthrax investigation at issue here – it must deal with the twin realities that (1) the law is very unclear and (2) there is a real risk of being held liable for "republishing" the implication that the individual involved is, in fact, a wrongdoer. This Court should take this opportunity to provide both clarity and proper constitutional protection.

II. THE COURT SHOULD GRANT CERTIORARI AND ENFORCE A FIRST AMENDMENT LIMIT ON COMMON LAW DEFAMATION LIABILITY FOR PRESS REPORTS ON GOVERNMENT ACTIONS.

The Court should grant certiorari to bring clarity to this area of unsettled law and to ensure that common law theories of liability are not permitted to stifle important news reporting. A general rule protecting the press from liability for accurate reporting on government investigations and other similar government actions would cohere with and

complement this Court's previous decisions requiring the common law of defamation to yield in certain circumstances to constitutional free speech principles. It also would be consistent with the Court's recognition of the central role played by the press in facilitating self-government.

This Court has repeatedly recognized that in certain instances the First Amendment guarantees of free speech and free press may require limiting the reach of traditional common law defamation and related torts. *See, e.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The Court has required these constitutional limitations, despite their attendant burdens on some private litigants, because of "the need to encourage debate on public issues." *Hepps*, 475 U.S. at 777. Without such constitutional protections, the public would be deprived of speech on important matters. *Id.* (observing that the "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result."); *see also Bresler*, 398 U.S. at 11-14. In *New York Times Co. v. Sullivan*, the Court recognized the particularly pernicious effect of potential tort liability on reports criticizing the government, observing that "[w]hether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278.

The Court's decision in *Bresler* recognized the importance of giving the press sufficient leeway to report on

important – though controversial – government matters, in part by rejecting the plaintiff's attempt to hold the defendant liable for the truth of the underlying accusation, rather than the truth of the report that the accusation occurred. In *Bresler*, the Court held that a newspaper was not liable for defamation for its coverage of "several tumultuous city council meetings," during which meetings the plaintiff's position was characterized as "blackmail." 398 U.S. at 7. The plaintiff's theory of liability was that the articles "imputed to him the crime of blackmail." *Id.* at 8. The Court rejected this argument, concluding that no reader would read the reporting as accusing Bresler of the crime of blackmail. *Id.* at 14. According to the Court, "the imposition of liability on such a basis was *constitutionally impermissible* – that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported." *Id.* at 13 (emphasis added); *see also Hustler Magazine*, 485 U.S. at 50 (First Amendment precluded recovery in state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" in literary definition of a union "scab" not a basis for a defamation action since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"). *Bresler* further recognized that "[t]o permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." 398 U.S. at 14.

A general rule protecting accurate reports of government action, whether the action is "official" or not, is necessary to safeguard what this Court has recognized is the critical role of the press in informing the public about the actions of its

government. The constitutional guarantees of free speech and a free press "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'" *Time, Inc. v. Hill*, 385 U.S. at 389 (quoting *New York Times v. Sullivan*, 376 U.S. at 254; alterations in original); *see also Mills*, 384 U.S. at 219 (noting that the "Constitution specifically selected the press" to fulfill an "important role" in our democracy). Reporting on government investigations is critical to the public's ability to evaluate how their elected and appointed officials are executing the responsibility of enforcing the laws and protecting the peace. *See, e.g.*, *Cox Broad.*, 420 U.S. at 492 ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."). As this Court has explained, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

These principles apply with full force to this case and argue strongly for this Court's review. As Judge Wilkinson observed, "[t]he public's right to know in this case was not a matter of voyeurism, titillation, or idle curiosity. The bioterrorism presaged by these anthrax mailings was no small matter, and it may one day pose a threat on a very large scale." Pet. App. 74a (Wilkinson, J., dissenting from denial of rehearing en banc). The approach taken by the panel

majority threatens to chill similarly important reporting in the future: "The prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well." *Id.* at 67a. "Doubtlessly, it is painful to be cast before the public as the target of an investigation where later events point to baseless or vexatious charges. The greater wrong, however, would be to shroud in secrecy, for want of publication, the government's scrutiny of its citizens." *Sibley v. Holyoke Transcript-Telegram Publ'g Co.*, 461 N.E.2d 823, 826 (Mass. 1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

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February 21, 2006

APPENDIX

DESCRIPTION OF *AMICI CURIAE*

ABC, Inc. is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, the ABC Radio Network, 72 radio stations and 10 television stations that regularly gather and report news to the public. ABC News produces the television programs *World News Tonight*, *20/20*, *PrimeTime Live*, *Good Morning America*, and *Nightline*, among others.

The American Society of Newspaper Editors (ASNE) is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 750 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

The Association of American Publishers, Inc. (AAP) is the national trade association of the U.S. book publishing industry. AAP's members include most of the

major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Belo Corp. began as a Texas newspaper company in 1842 and today is one of the nation's largest media companies with a diversified group of market-leading newspaper, television, cable, and interactive media assets. Belo's daily newspapers include *The Dallas Morning News* and *The Providence Journal* (the United States' oldest major daily newspaper of general circulation and continuous publication). Belo's nineteen television stations include six stations in the fifteen largest United States broadcast markets. Belo also owns or operates seven cable news channels and owns more than thirty news and information Web sites.

Cable News Network LP, LLLP is a wholly owned subsidiary of Turner Broadcasting System, Inc., which is in turn wholly owned by Time Warner, Inc. CNN is the world's largest news organization with over a dozen television and radio news networks and websites available worldwide, as well as several news programming services, which are provided to affiliates domestically and worldwide. CNN employs more than 3,000 news professionals, who gather news throughout the world.

Cox Enterprises, Inc., through its Atlanta Newspapers Division and wholly-owned direct subsidiary Cox Newspapers, Inc., publishes *The Atlanta Journal-Constitution* and sixteen other daily and twenty-five non-daily newspapers.

Daily News, L.P. publishes the New York *Daily News*, which is the fifth-largest circulation newspaper in the country, serving primarily the New York City metropolitan area.

Dow Jones & Company, Inc. publishes, *inter alia*, *The Wall Street Journal*, *Barron's* magazine, and other periodicals, and, through its Ottaway Newspapers, Inc. subsidiary, a number of daily and weekly community newspapers.

The E.W. Scripps Company is a diverse media company with interests in newspaper publishing, broadcast television, and national television networks. The company operates 21 daily newspapers, with a combined paid daily circulation of 1.1 million; 15 broadcast television stations, including six ABC affiliates and three NBC affiliates; and five cable and satellite television programming networks and a television retailing network totaling more than 84 million subscribers.

Fisher Communications, Inc. is an integrated media company that has been in the broadcasting business since 1926. It owns and operates nine network-affiliated television stations and 27 radio stations in the Pacific Northwest, with its headquarters in Seattle, Washington. The Company owns a 50% interest in a company that owns a tenth television station in Oregon. Its largest stations are ABC affiliates in Seattle, Washington and Portland, Oregon.

Forbes Inc. is the publisher of *Forbes*, the nation's leading business magazine, with a North American circulation of 900,000. *Forbes*, *Forbes Asia*, with a circulation of over 80,000, and the company's local language editions together reach a worldwide audience of over 5 million. Forbes.com, the No. 1 business site on the web, publishes more than 1,500 articles throughout the business

day. Other company divisions include ForbesLife, Forbes Custom Media, Forbes Conference Group and American Heritage, publisher of *American Heritage*, *American Legacy*, and *American Heritage of Invention and Technology* magazines.

Freedom Communications, Inc., headquartered in Irvine, California, is a privately-owned diverse media company that primarily publishes metropolitan area and community newspapers and operates television broadcast stations. The company and its affiliates publish 28 daily and 48 weekly newspapers in 11 states, with a combined circulation of just over 1 million. Freedom's flagship newspaper is *The Orange County Register*, published in Santa Ana, California, with daily circulation of approximately 300,000 and Sunday circulation of approximately 358,000. The television broadcast division includes eight stations in seven states, with five CBS and three ABC network affiliates.

Gannett Co., Inc. is an international news and information company that publishes 91 daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including *USA TODAY*, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 23.3 million. The company also operates more than 130 websites in the United States and a national news service. Gannett's 21 television stations cover 17.9 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television, and is the majority owner of Hearst-Argyle Television, Inc., a

publicly traded company that owns and operates numerous television broadcast stations.

Landmark Communications, Inc. is a privately-held media company with national and international interests in newspapers, broadcasting, cable programming, and electronic publishing, including The Weather Channel, *weather.com*, and *The Virginian-Pilot*.

The McGraw-Hill Companies, Inc. is a multimedia publishing and information company that publishes books and magazines, including *BusinessWeek*, and also operates four local television stations.

The National Association of Broadcasters (NAB) is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission, and the Courts. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to disseminate freely programming and information of all types.

NBC Universal, Inc. is one of the world's leading media and entertainment companies in the development, production, and marketing of news, entertainment, and information to a global audience. NBC Universal owns and operates the NBC television network, a Spanish-language television network (Telemundo), NBC News, several news and entertainment networks including MSNBC and CNBC, and a television stations group consisting of 29 owned and operated television stations that produce substantial amounts of local news, sports, and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline," and "Meet the Press."

The Newspaper Association of America (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The New York Press Club, Inc. is an association of more than 700 members currently or formerly in the news media. The organization was established in July 1948 for the main purpose of promoting freedom of the press and secondarily to provide educational services for those entering and already in the field of journalism. The organization is headquartered in New York City and now represents members throughout the New York metropolitan area in both electronic and print media.

The Radio-Television News Directors Association (RTNDA) is a professional association devoted to electronic journalism. RTNDA represents local and network news executives, educators, students, and others in the radio, television, and cable news business worldwide. RTNDA's general nature and purpose is to encourage excellence in the electronic journalism industry and to work to uphold and promote the First Amendment freedoms of the news media.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors. The Reporters Committee's general nature and purpose is to work to defend the First Amendment and freedom of information interests of the news media.

Reuters America LLC is an indirect subsidiary of Reuters Group Plc. Founded in 1851 in London, Reuters serves the global financial markets and news media with a wide range of information products and transactional

solutions. These include real-time and historical market data; research and analytics; trading platforms across a range of financial instruments; collective investment data and benchmarking analytics; plus news in text, video, graphics, and photographs. Some 327,000 financial market professionals working in the equities, fixed income, foreign exchange, money, commodities, and energy markets around the world use Reuters products. Reuters is also the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 197 bureaus around the world, serving 130 countries, and publishes approximately 30,000 headlines daily, including third party contributions, in 19 languages.

The Society of Professional Journalists is the largest and most broad-based journalism organization in the United States, with a membership consisting of professional working journalists, college and university professors, and student journalists. The Society is committed to encouraging the free practice of journalism, improving the quality of journalism, and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists, and protects the guarantees of freedom of speech and press found in the First Amendment to the United States Constitution.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 150 magazines in the United States and abroad. Its major titles include *Time*, *Fortune*, *Sports Illustrated*, *People*, *InStyle*, *Real Simple*, *Money*, and *Entertainment Weekly*. Time Inc. is a subsidiary of Time Warner Inc.

Tribune Company is one of the nation's premier media companies, reaching more than 80 percent of U.S. households. Tribune publishes 11 market-leading

newspapers including the *Chicago Tribune*, *Newsday*, *Los Angeles Times*, and the *Baltimore Sun*; owns and operates 26 television stations; and operates a network of local and national news and information web sites throughout the United States.

U.S. News & World Report, L.P. publishes *U.S. News & World Report* magazine, a weekly national newsmagazine devoted to investigative journalism and to reporting and analysis of national and international affairs, politics, business, health, education, science, technology, and social trends. Through its annual rankings of America's Best Colleges, Best Graduate Schools, and America's Best Hospitals, along with its News You Can Use® brand, *U.S. News* has earned a reputation as the leading provider of service news and information.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 678,000 and a Sunday circulation of over 965,000. The newspaper is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation.